Applicant Details

First Name	**Laith**
Middle Initial	**M.**
Last Name	**Adawiya**
Citizenship Status	**U. S. Citizen**
Email Address	**lmadawiya@ucdavis.edu**
Address	**Address** Street **8 El Vado Drive** City **Rancho Santa Margarita** State/Territory **California** Zip **92688** Country **United States**
Contact Phone Number	**(949)-973-8101**

Applicant Education

BA/BS From	**University of California-Los Angeles**
Date of BA/BS	**June 2021**
JD/LLB From	**University of California, Davis School of Law (King Hall)** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90502&yr=2011**
Date of JD/LLB	**May 11, 2024**
Class Rank	**Below 50%**
Law Review/ Journal	**Yes**
Journal(s)	**Journal of International Law and Policy** **Business Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Neumiller Moot Court Competition** **ABA National Appellate Advocacy Competition** **Appellate Advocacy I & II**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Joseph, Jeannie
jjoseph@occourts.org
Canzoneri, Michael
macanzoneri@ucdavis.edu
Wagner, Ryan
ddawagner@ucdavis.edu

References

(1.) Judge Jeannie Joseph - (jjoseph@occourts.org) - (657) 622–5252 (2.) Professor Michael Canzoneri - (macanzoneri@ucdavis.edu) - (916) 990-5902 (3.) Professor Ryan Wagner - (ddawagner@ucdavis.edu) (Note: Each reference's letter of recommendation has been uploaded through OSCAR.)

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Cover Letter **Laith M. Adawiya**

United States District Court – District of New Mexico
Pete V. Domenici United States Courthouse
333 Lomas Blvd NW, Suite 660
Albuquerque, New Mexico 87102

Dear Judge Browning,

Please find attached my resume, transcripts, writing samples, and letters of recommendation for your review and consideration in connection with your chamber's 2025 – 2026 clerkship position. I will be entering my third year at the UC Davis School of Law, and am on track to graduate in the Spring of 2024. Following my graduation, I hope to fulfill my life-long career goal of working in public service. Towards that end, I believe that this clerkship opportunity, and the experience it will provide me, will be the perfect first step in achieving that goal.

My passion for public service began in high school, when I came upon a speech given by Senator Robert F. Kennedy in Indianapolis following the assassination of Martin Luther King Jr. I was so struck by the eloquence and passion of his words – a call for peace and understanding between all Americans – that I decided to dedicate my professional life to public service; to pursue a career that, in the spirit of Senator Kennedy, attempts to help the poor and underprivileged. From a young age, my parents instilled in me the importance of integrity, justice, and the impartiality of law in society; and perhaps no institution is more dedicated to these ideals than the Judiciary.

As a District Court, your chambers are at the forefront of debates regarding national matters, handling issues that will ultimately affect countless Americans. The areas in which the District Court of New Mexico engages – ranging from civil rights, to the environment, to immigration – interest me tremendously. And as a law student, an aspiring public servant, and much more importantly, a fellow American, I hope to partake in that work; to aid in the process of ensuring that the Judiciary continues to commit itself towards that demanding, yet admirable goal of "Equal Justice Under the Law." As the former Deputy A.G. at the New Mexico Department of Justice, I suspect you cherish those same values and ideals.

My studies and work experience thus far – outlined on the attached resume - have only served to strengthen my dedication to that cause, and I believe have prepared me well for this clerkship opportunity. I am confident that you will find me as someone who has a very strong work ethic, and who will support your chambers reviewing trial records, researching applicable law, and drafting legal memoranda and court opinions among other things.

For those reasons, and more, it would be an honor to be selected for your chamber's 2025 – 2026 clerkship, and work alongside you and other dedicated professionals that share my passion for public service.

Please do not hesitate to contact me should you need any additional information. I thank you for your consideration, and look forward to hearing from you.

Sincerely,

Laith M. Adawiya

Email: lmadawiya@ucdavis.edu Phone Number: (949)-973-8101

Laith M. Adawiya

Phone: (949) 973-8101
Email: lmadawiya@ucdavis.edu

Education

J.D. | Expected Graduation Date: May, 2024
University of California, Davis School of Law, CA 95616

B.A. in Political Science | Graduation Date: June, 2021
University of California, Los Angeles, CA 90095
Focus: American Politics
Minor: History
GPA: 3.918/4.00 – Magna Cum Laude

A.A. in Political Science | Graduation Date: May, 2019
Saddleback College, CA 92692
GPA: 4.00/4.00

Experience

Legal Intern | June 2023 – August 2023
Office of Legislative Counsel, Sacramento, CA 95814

- Provide legal advice to California State legislators regarding constitutional, administrative, and procedural matters
- Assist in the drafting of legislation for the California State Legislature

Superior Court Judicial Extern | June 2022 – August 2022
OC Superior Court, Orange County, CA 92701

- Observed OC Superior Court arraignments, trials, and other proceedings
- Discussed case issues with Judges and other Externs
- Completed legal memorandum as assigned by Judge

Undergraduate Reader | October 2020 – December 2020
University of California, Los Angeles, CA 90095

- Attended "Political Science 145B – Federalism and Separation of Powers" course
- Met with instructor and other readers to go over grading format and course logistics
- Graded student essays and submitted constructive comments

College Extern | June 2020 – September 2020
U.S. Attorney's Office, Los Angeles, CA 90012

- Aided Assistant U.S. Attorneys with projects and casework through research, organization, trial preparation, transcription, and analysis of evidence, requiring security clearance
- Attended various panels hosted by officials from different agencies and branches of government

Student Assistant | September 2019 – March 2020
UCLA School of Law, Los Angeles, CA 90095

- Aided faculty assistants in day-to-day affairs
- Assisted with word-processing, department events, and basic administrative and clerical duties
- Internet research, data entry, running of errands, etc.

Guest Service Representative | June 2017 - September 2019
Courtyard Marriott, Foothill Ranch, CA 92610

- Greeted, registered, and assigned rooms to guests
- Promptly and effectively dealt with guest requests and complaints
- Reconciled cash drawer contents with transactions during shift

Congressional Intern | October 2017 - August 2018
Congresswoman Mimi Walters, Irvine, CA 92612

- Answered phone calls from constituents
- Aided staffers in day-to-day affairs
- Helped prepare various events in California's 45th district (e.g. Congressional Art Competition, Military Academy Showcase)

Languages & Skills

Foreign Language: Arabic
Office Applications: Microsoft Word, PowerPoint, Excel, & Outlook
Research Tools: Internet Explorer, Microsoft Edge, Google Advanced Search
Editing Applications: Adobe Acrobat

Achievements & Activities

Civil Rights Clinic – Fall 2023
UC Davis Law

Moot Court Honors Board – 2023-Present
UC Davis Law

Moot Court Judge Recruitment Chair – 2023-Present
UC Davis Law

ABA National Appellate Advocacy Competition – Spring 2023
UC Davis Law

Moot Court – Spring 2022, Fall 2022, Spring 2023
UC Davis Law

King Hall Negotiations Team Member – 2023-Present
UC Davis Law

King Hall Negotiations Team Intraschool Competition – Spring 2023
UC Davis Law

Journal of International Law and Policy (Submissions Chair) – 2023-Present
UC Davis Law

Journal of International Law and Policy (Research Editor) – 2022-2023
UC Davis Law

Business Law Journal (Editor) – 2022-2023
UC Davis Law

King Hall International Law Association (Vice President) – 2022 - 2023
UC Davis Law

Dean's Honors List – Winter 2020, Spring 2020, Fall 2020, Winter 2021, Spring 2021
UCLA

Dean's List – Fall 2017, Spring 2018, Fall 2018, Spring 2019
Saddleback College

Honors Program - 2018 - 2019
Saddleback College

Volunteer Service

Yolo County Animal Shelter – 2022 - Present

UNOFFICIAL PAGE: 1

LAITH M. ADAWIYA ID 920-258-398

PROFESSIONAL ACADEMIC RECORD

CURRENT COLLEGE(S): LAW
CURRENT MAJOR(S): LAW

ADMITTED: FALL SEMESTER 2021

INSTITUTION CREDIT:

FALL SEMESTER 2021

LAW	200	INTRODUCTION TO LAW	S	1.00	.00
LAW	202	CONTRACTS	B	4.00	12.00
LAW	203	CIVIL PROCEDURE	B-	5.00	13.50
LAW	207	RESEARCH & WRITING I	B	2.00	6.00

	COMPL	ATTM	PSSD	GPTS	GPA
TERM:	12.00	11.00	11.00	31.50	2.863
UC CUM:	12.00	11.00	11.00	31.50	2.863

SPRING SEMESTER 2022

LAW	200L	LAWYERING PROCESS LAB	S	.00	.00
LAW	200S	LAWYERING PROCESS	S	2.00	.00
LAW	201	PROPERTY	B	4.00	12.00
LAW	204	TORTS	B+	4.00	13.20
LAW	205	CONSTITUTIONAL LAW I	A	4.00	16.00
LAW	208	LGL RESRCH & WRITING II	B	2.00	6.00

	COMPL	ATTM	PSSD	GPTS	GPA
TERM:	16.00	14.00	14.00	47.20	3.371
UC CUM:	28.00	25.00	25.00	78.70	3.148

FALL SEMESTER 2022

LAW	206	CRIMINAL LAW	A-	3.00	11.10
LAW	227A	CRIMINAL PROCEDURE	B+	3.00	9.90
LAW	252A	INTRO CRIM LITIGATION	A-	2.00	7.40
LAW	282	ENERGY LAW	A	2.00	8.00
LAW	288C	NATIONAL SECURITY LAW	A-	2.00	7.40
LAW	410A	APPELLATE ADVOCACY I	S	2.00	.00

	COMPL	ATTM	PSSD	GPTS	GPA
TERM:	14.00	12.00	12.00	43.80	3.650
UC CUM:	42.00	37.00	37.00	122.50	3.310

SPRING SEMESTER 2023

LAW	210J	BEST PRACT FOR JUSTICE	A	2.00	8.00
LAW	219C	EVIDENCE	B-	4.00	10.80
LAW	267	CIVIL RIGHTS LAW	A-	2.00	7.40
LAW	296E	ART & CULTURAL LAW	A-	3.00	11.10
LAW	410B	MOOT COURT	S	2.00	.00
LAW	413	INTRSCHL COMPETITN	S	2.00	.00

	COMPL	ATTM	PSSD	GPTS	GPA
TERM:	15.00	11.00	11.00	37.30	3.390
UC CUM:	57.00	48.00	48.00	159.80	3.329

FALL SEMESTER 2023

WORK IN PROGRESS:

LAW	218	CONSTITUTIONAL LAW II	4.00
LAW	235	ADMINISTRATIVE LAW	3.00
LAW	246	FEDERAL JURISDICTION	3.00
LAW	263A	TRIAL PRACTICE	3.00

IN PROGRESS CREDITS: 13.00

********** CONTINUED ON NEXT COLUMN **********

LAITH M. ADAWIYA

CONTINUED

********** TRANSCRIPT TOTALS **********

TOTAL UNITS COMPLETED: 57.00 UC GPA: 3.329
UC BALANCE POINTS: 63.8

COMMENTS:
LAW WRITING REQUIREMENT SATISFIED - LAW 288C

********** MEMORANDA **********
UNIVERSITY REQUIREMENTS:

PREVIOUS DEGR:
BACHELOR OF ARTS 06/01/21
UC LOS ANGELES (UCLA)

END OF RECORD

UNOFFICIAL UC DAVIS TRANSCRIPT COMPUTER PRODUCED ON 06/03/23 - ISSUED TO STUDENT.

University of California, Los Angeles
UNDERGRADUATE Student Copy Transcript Report

Student Information

Name: ADAWIYA, LAITH M
UCLA ID: 205330834
Date of Birth: 04/21/XXXX
Version: 08/2014 | SAITONE
Generation Date: February 15, 2022 | 12:00:37 PM
This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 09/23/2019
COLLEGE OF LETTERS AND SCIENCE

Major:
POLITICAL SCIENCE

Minor:
HISTORY

Degrees | Certificates Awarded

BACHELOR OF ARTS Awarded June 11, 2021
in POLITICAL SCIENCE
With a Minor in HISTORY
Magna Cum Laude

Secondary School

TESORO HIGH SCHOOL, June 2017

University Requirements

Entry Level Writing	satisfied
American History & Institutions	satisfied

California Residence Status

Resident

Transfer Credit

Institution		Psd
ADVANCED PLACEMENT	1 Term to 10/2019	28.0
IRVINE VALLEY COLLEGE	1 Term to 10/2019	4.5
SADDLEBACK COLLEGE	1 Term to 10/2019	87.0

Fall Quarter 2019

Major:
POLITICAL SCIENCE

US ECON-1790-1910	HIST 141A	4.0	14.8	A-
THE PRESIDENCY	POL SCI 140B	4.0	13.2	B+
SEPARATN OF POWERS	POL SCI 145B	4.0	16.0	A

	Atm	Psd	Pts	GPA
Term Total	12.0	12.0	44.0	3.667

Winter Quarter 2020

US ECON-1910-NOW	HIST 141B	4.0	16.0	A
PEACE AND WAR	POL SCI 126	4.0	14.8	A-
CONGRESS	POL SCI 140A	4.0	16.0	A

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	12.0	12.0	46.8	3.900

Spring Quarter 2020

US CIVIL WAR&RECON	HIST 139A	4.0	16.0	A+
FOREIGN RELATION-US	POL SCI 120A	4.0	16.0	A
CIVIL LIBERTIES	POL SCI 145C	4.0	16.0	A+

Due to the COVID-19 pandemic, Passed/ Not Passed grading permitted for many classes and degree requirements.

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	12.0	12.0	48.0	4.000

Fall Quarter 2020

US THGHT 1620-1865	POL SCI 114A	4.0	14.8	A-
PRES ELECTIONS	POL SCI 149	4.0	16.0	A
CAREERS IN POLI SCI	POL SCI 149	4.0	16.0	A

Due to the COVID-19 pandemic, Passed/ Not Passed grading permitted for many classes and degree requirements.
Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	12.0	12.0	46.8	3.900

Winter Quarter 2021

RVLU AMER 1760-1800	HIST 138B	4.0	16.0	A+
SUPREME COURT	POL SCI 140C	4.0	16.0	A+
CLNLSM&DCRS&DMCRCY	POL SCI 163B	4.0	16.0	A+

Due to the COVID-19 pandemic, Passed/ Not Passed grading permitted for many classes and degree requirements.
Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	12.0	12.0	48.0	4.000

Spring Quarter 2021

INTRO TO ANIMATION	FILM TV C181A	5.0	20.0	A
U S 1875-1900	HIST 139B	4.0	16.0	A
REEL BEATLES	MSC IND 188	4.0	16.0	A+
ACTING&PRFRMNC-FILM	THEATER 120C	5.0	20.0	A+

Due to the COVID-19 pandemic, Passed/ Not Passed grading permitted for many classes and degree requirements.
Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	18.0	18.0	72.0	4.000

UNDERGRADUATE Totals

	Atm	Psd	Pts	GPA
Pass/No Pass Total	0.0	0.0	N/a	N/a
Graded Total	78.0	78.0	N/a	N/a
Cumulative Total	78.0	78.0	305.6	3.918

Total Non-UC Transfer Credit Accepted	119.5
Total Completed Units	197.5

END OF RECORD
NO ENTRIES BELOW THIS LINE

Superior Court of California
County of Orange

Chambers of
JEANNIE M. JOSEPH
JUDGE
C52

700 CIVIC CENTER DRIVE WEST
SANTA ANA, CA 92701
PHONE: 657-622-5251

June 20, 2023

To Whom It May Concern:

I am writing to recommend Laith Adawiya for a clerkship. Mr. Adawiya served as my extern during the summer of 2022 when he was a 1L. Mr. Adawiya was not only diligent, inquisitive, and hardworking, but he demonstrated excellent legal skills.

Over the course of the summer, Mr. Adawiya researched a number of legal issues that arose in criminal trials over which I presided. One issue was application of the new law on preemptory challenges in a criminal jury trial, how it differed from the prior state of the law, and the effects this law could have in the future. His work product was consistently thorough, well-researched, well-written, and well-thought out. His legal analysis was on point.

In addition, Mr. Adawiya was always keen to learn new things. He met all assignments with enthusiasm, embracing the opportunity to broaden his legal horizons. He took advantage of every opportunity to view all aspects of the justice system, including trials, preliminary hearings, law and motion, and calendar courts on the criminal side, as well as civil and family court matters.

Finally, Mr. Adawiya's personality made him a noteworthy extern. He was professional in interacting with everyone at the courthouse, including judges, attorneys, and staff. He was well-liked by everyone with whom he worked. He was simply a pleasure to have.

In sum, Mr. Adawiya is a stellar candidate for a clerkship, and I cannot recommend him highly enough. Please do not hesitate to contact me at (657) 622-5252 if you need more information.

Sincerely,

Jeannie M. Joseph
Judge, Orange County Superior Court

UNIVERSITY OF CALIFORNIA, DAVIS

BERKELEY • DAVIS • IRVINE • LOS ANGELES • MERCED • RIVERSIDE • SAN DIEGO •SAN FRANCISCO SANTA BARBARA • SANTA CRUZ

June 20, 2023

Dear Judge,

I would like to express my support for Laith Adawiya's application for a clerkship position with either the State or Federal courts. I feel confident recommending Mr. Adawiya, who I know as Laith, for this position, based on my opportunity to see his work while coaching him, as a second-year law school competitor, in the prestigious American Bar Association National Appellate Advocacy Competition in 2023, and while seeing him perform in the Appellate Advocacy classroom series, during his second year of instruction.

Laith distinguished himself as an outstanding oral advocate, researcher, and team player, while participating in the Moot Court program at King Hall. He performed very well at the Los Angeles regional competition in the 2023 NAAC Competition as a 2-L, where he argued the complex issue of whether an academic freedom exception applied to a professor's classroom speech, which prevented a public university from disciplining the professor for espousing views contrary to the curriculum and values of the university. What I saw during that experience was his command of the courtroom, incredible knowledge of the law of the problem, and his natural ability to answer difficult questions. Laith is a powerful advocate who exudes great knowledge and confidence, while presenting a calm eloquence. But equally important, in the weeks prior to the February competition rounds, I saw that Laith was an incredibly hard worker, who thoughtfully and critically evaluated the strengths and weaknesses of his arguments as well as those of his opposing counsel. Laith has a great mind for the law, and during the competition he was exceptionally deft at responding the court panel's questions, respectfully and persuasively advocating for his side. Moreover, throughout the competition, Laith was respectful to his competitors and supportive of his teammates. During this experience, I was also fortunate to observe his wonderful sense of humor and his enthusiasm for the law and advocacy.

In sum, I believe Laith's great ability to research and synthesize the law, along with his skill as an oral advocate to explain complex legal principles, will make him an excellent addition to any Court's chambers. Also, I am confident that his comfortable style of working with others will allow him to blend in well with the Court's judges, attorneys and staff.

If I can answer any questions or otherwise assist you further in your evaluation of Laith's application, please do not hesitate to call upon me.

Sincerely,

Michael Canzoneri
Continuing Lecturer
UC Davis School of Law
400 Mrak Hall Drive
Davis CA, 95616
(916) 990-5902

UC DAVIS SCHOOL OF LAW

February 25, 2023

To Whom it May Concern,

We have had the privilege of teaching Laith Adawiya over the course of the last year. He has taken both our Introduction to Criminal Litigation course and our Best Practices for Justice seminar. Laith is a bright and hardworking law student who excelled in our classes.

He is a valuable contributor in discussions. During an intensive litigation course, Laith was adept at articulating and supporting his position. Perhaps even more impressive, Laith is equally adept at respectfully pushing back against opposing views and ensuring that the outcomes are fair and just. Laith is a strong and passionate candidate who will excel in his pursuit of what is right.

In addition to his participation in class, we have reviewed his legal writing abilities with the briefs he authored for our course. Laith is a fantastic writer. His work product is persuasive and extremely professional. As practicing prosecutors with over thirty years of combined legal experience, we are especially familiar with effective legal writing. Based on the materials we have reviewed, we believe Laith will excel as an advocate.

In summary, we recommend Laith Adawiya highly for the clerkship that he is seeking. He will make a fantastic addition to the program.

Sincerely,

Ryan Wagner
Adjunct Lecturer
UC Davis School of Law

Brian Feinberg
Adjunct Lecturer
UC Davis School of Law

UC Davis School of Law • 400 Mrak Hall Drive • Davis, California 95616 • tel 530.752.0243 • fax 530.752.7279 • www.law.ucdavis.edu KINGHALL

Writing Sample #1 Laith M. Adawiya

ABA National Appellate Advocacy Competition Brief

The U.S. Court of Appeals for the Thirteenth Circuit was correct in finding for Westland Community College; the Petitioner's First Amendment rights were not violated. The reason for this is two-fold: firstly, this Court's decision in *Garcetti v. Ceballos* does not - and should not - provide for an "academic freedom" exception for public educators when teaching in classrooms; and secondly, since there is no "academic freedom" exception, and since the Petitioner was performing his "official duties" as a Government employee, his speech was not protected by the First Amendment.

Firstly, *Garcetti* does not provide for an "academic freedom" exception for in-classroom speech. While it is true that this Court mentioned "academic freedom" in *Garcetti*, its mention was little more than dicta in the Majority Opinion; it comprised a small paragraph – three brief lines – responding to Justice Souter's Dissenting Opinion. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006). In addition, it is unclear exactly how far-reaching that concept was intended to be, and what Justice Souter exactly meant by "academic freedom." Ultimately, the mention of "academic freedom" in *Garcetti* was more of a general indication that not *all* speech on a campus may necessarily be regulated; here, however, the only issue is "in-classroom" speech by an instructor.

It is also noteworthy that it was Justice Souter himself who – in an earlier case; *Board of Regents of University of Wisconsin v. Southworth* – wrote of a University's ability to dictate what is taught to students; no one claims, he wrote, "that [a] University is somehow required to offer a spectrum of courses to satisfy a viewpoint neutrality requirement," for instance. *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 243 (2000). A "University need not provide junior years abroad in North Korea as well as France, instruct in the theory of plutocracy as well as democracy, or teach Nietzsche as well as St. Thomas." *Id*. There's an understanding, in other words, that a University can regulate the curriculum communicated to its students.

Here, the Petitioner accuses Westland Community College of attempting to "cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents of University of State of N.Y.*, 385 U.S. 589, 603 (1967). But this is unfounded. The Respondents agree with the Petitioner that

academic freedom is an invaluable part of American society. But that academic freedom rests with the institution, not the individual professor. That was the implication of this Court in *Regents of University of California v. Bakke*, and it was the implication of Justice Frankfurter in *Sweezy v. State of New Hampshire*, in which he wrote that "it is the business of a University to provide that atmosphere which is most conducive to speculation, experiment, and creation… to determine for itself on academic grounds who may teach, what may be taught, [and] how it shall be taught." *Sweezy v. State of New Hampshire*, 354 U.S. 234, 263 (1957).

Indeed, it has been a long-standing premise that schools have the ability to regulate on-campus speech – including that of educators - without falling out of the First Amendment's favor. This is because, as the Seventh Circuit aptly put it, "a school system does not "regulate" teachers' speech as much as it hires that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary." *Mayer v. Monroe County Community School Corp.*, 474 F.3d 477, 479 (2007). And when one is paid a salary, they are expected to adhere to the policies and practices of their employer; this is not a revolutionary concept.

At the end of the day, a community college instructor is no different from any other government employee performing their job functions. Therefore, this court should not create an exception that would hamper a school's ability to discipline an instructor for in-class speech. This Court noted in *Hazelwood v. Kuhlmeier* that the classroom is not a "public forum" within the normal sense of the phrase - it is "reserved for other intended purposes" under which "school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988). This is particularly true when dealing with "school-sponsored speech," or speech "that students, parents, and members of the public might reasonably perceive to bear the" school's 'stamp of approval.' *Id*. at 271. And by simple implication, any speech by an educator inside the classroom, while teaching a class, falls within this category of "school-sponsored speech."

And the Respondents are not alone in this belief; numerous Circuit Courts have relied heavily on this proposition in the conduct of their judicial affairs.

Writing Sample #1 Laith M. Adawiya

Justice Alito, writing then for the Third Circuit Court of Appeals, in *Edwards v. Cal. Univ. of Penn.*, acknowledged that "a public university professor does not have a First Amendment right to decide what will be taught in the classroom." *Edwards v. Cal. Univ. of Penn.*, 156 F.3d 488, 491 (1998).

The Tenth Circuit, too, has acknowledged - as it did in *Adams v. Campbell County* – that educators do not "have an unlimited liberty as to [the] structure and content of the courses" they teach. *Adams v. Campbell County School Dist.*, 511 F.2d 1242, 1247 (1975).

The Eleventh Circuit stated, "we do not find support to conclude that academic freedom is an independent First Amendment right." *Bishop v. Aronov*, 926 F.2d 1066, 1075 (1991). In *Bishop v. Aronov*, the University of Alabama tried to prevent Dr. Bishop from expressing his religious views in the classroom. In finding that Dr. Bishop's comments constituted "school-sponsored speech," the Eleventh Circuit held that "Dr. Bishop's interest in academic freedom and free speech do[es] not displace the University's interest inside the classroom," and that the University of Alabama was well-within its right to prohibit Dr. Bishop from expressing his religious views during class hours. *Id*. at 1076.

The Thirteenth Circuit has also noted - as it did in the proceedings of this case - "that there is no basis for carving out an exception from the *Garcetti* rule for in-class speech of a public college instructor." R. at 17.

This Court should thus maintain the status quo with respect to *Garcetti*, and explicitly hold that there is no "academic freedom" exception for in-class speech by an instructor.

Moving onto the second point; since there is no "academic freedom" exception for in-classroom speech, the "official duties" test of *Garcetti* should apply, meaning that the Petitioner's speech was not protected by the First Amendment.

Briefly summarized, at issue in *Garcetti* was a Deputy District Attorney - Cabellos - who claimed he was retaliated against for writing a memorandum pointing out inaccuracies in an affidavit. In holding that Cabellos' speech was not protected, this Court held that "when public employees make statements pursuant to their official duties, [they] are not speaking as citizens

for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421. The "controlling factor" in *Garcetti* was the fact that Cabellos had been making "expressions… pursuant [to his] duties as a [public employee]." *Id*.

With all that said, the Respondents would like to acknowledge the importance of exercising one's rights as a "citizen" while "on the job." Indeed, the Respondents agree with the Petitioner on this point. After all, this Court noted in the same breath in *Garcetti* that "public employees do not surrender all their First Amendment rights by reason of their employment." *Id*. at 417.

The threshold question, therefore, is whether or not one is speaking pursuant to their "official duties," or as a "citizen." Whether, as this Court acknowledged in *Kennedy v. Bremerton School District*, the employee was "acting within the scope of his duties" when speaking. *Kennedy v. Bremerton School District*, 142 S.Ct. 2407, 2425 (2022). Only if the answer is "yes" does the possibility of a First Amendment violation arise. But in the Petitioner's case, even assuming all facts alleged in the complaint are true, the answer is a resounding "no."

For the Petitioner acknowledged, in his own words, that the comments he had made in class were "a valid part of the lesson he was teaching." R. at 6. In no uncertain terms, he acknowledged that he was fulfilling his role as an educator employed by the Government when speaking inside the classroom. This is compounded by the fact that - similar to *Garcetti* – the Petitioner's comments were directly related to his responsibilities as an educator. Furthermore, the Petitioner subsequently defended his comments to his superior, explaining that "philosophy students must learn to have a rational discussion on controversial issues." R. at 6.

Thus, taking the Petitioner's words at face value, it is clear that even he believed he was speaking pursuant to his "official duties." This means that his speech was not shielded by the First Amendment, and Westland Community College was well within its right to regulate it.

To conclude, the Petitioner was clearly acting in accordance with his "official duties" as a Government employee when lecturing students during class time, meaning such speech is not afforded the full breadth of the First Amendment's protection. Furthermore, it is established

precedent - by this Court and Lower Courts - that Universities have the right to regulate an educator's speech inside the classroom without falling awry of the First Amendment.

The Respondents respectfully request that this Court clarify *Garcetti* with respect to academia as follows: there is no "academic freedom" exception to *Garcetti* for speech by an instructor in a classroom.

The heart of *Garcetti* - whether or not one is speaking pursuant to their "official duties" - should control even in academic public employment circumstances. As such, the First Amendment does not limit a public community college's power to discipline an instructor for in-class speech. With that said, the Respondents respectfully request that this Court affirm the Court of Appeals' ruling - that the Petitioner lacked a plausible First Amendment retaliation claim.

Writing Sample #2 Laith M. Adawiya

Memorandum on *Batson/Wheeler* Challenges and A.B. 3070

A centerpiece of the American judicial system involves the right to a trial by jury. So imperative to the administration of justice was this idea that three of the original ten Amendments comprising the Bill of Rights dealt with it. Indeed, the 5th Amendment forbids an individual to "be held to answer for a capital... crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. In cases of criminal prosecution, the 6th Amendment requires that "the accused shall enjoy [a trial by] an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. This has been further interpreted as requiring a jury consisting of a "representative cross-section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). Finally, the 7th Amendment requires that in cases involving a "value of controversy" exceeding $20, "the right of trial by jury shall be preserved." U.S. Const. amend. VII. In short, it is evident that the Founders considered the right to a trial by jury an indispensable part of the idea of 'blind and impartial justice.'

Of course, this right would be moot and inept if the composition of the jury in question was not selected on an impartial basis. This is the issue at hand with respect to the '*Batson/Wheeler* Challenge.' While conducting voir dire, or the selection of a jury, both the plaintiff and defendant are permitted to strike jurors 'for cause' if either side determines a valid reason for the jurors being unable to be 'fair and impartial.' In addition to these 'for-cause challenges,' each side also has a limited number of 'peremptory challenges' that can be used to remove any potential juror, without need for a reason. These 'peremptory challenges' "traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury." *Batson v. Kentucky*, 476 U.S. 79, 91 (1986). At the heart of the '*Batson/Wheeler* Challenge' is the issue of whether race, gender, or other 'group prejudices' are being taken into account during voir dire.

The justification for placing limitations on peremptory challenges lies in the history of juror discrimination. It can be said that the history of the United States has been exemplified by the gradual admission of marginalized groups into previously prohibited sectors of public life. One of these has been the ability to serve on a jury, and to not be arbitrarily denied that right simply because of one's identity. Over the years, courts have utilized the 14th Amendment's 'Equal Protection Clause' as the vehicle for this progress.

Writing Sample #2 Laith M. Adawiya

As early as 1880, in *Strauder v. West Virginia*, the Supreme Court had acknowledged that the discrimination of jurors on the basis of race was impermissible. Citing the recently ratified 14th Amendment, the Court ruled that "the very idea of a jury is a body... composed of [one's] neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Strauder v. State of W. Virginia*, 100 U.S. 303, 308 (1879). In doing so, the Court overturned a West Virginia statute excluding blacks from serving on juries, holding that it "amount[ed] to a denial of the equal protection of the laws." *Id.* at 310. From then on, the issue involved the degree to which unconstitutional discrimination was occurring in the selection of a jury, and the requirements to prove such a claim.

In *Batson v. Kentucky*, the Supreme Court was once again confronted with the issue of whether a defendant was "denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." *Batson*, 476 U.S. at 82. Specifically, a black man was charged with burglary, and subsequently convicted by an all-white jury. During the voir dire process, the prosecutor "used his peremptory challenges to strike all four black persons on the venire." *Id.* at 83. In *Batson*, the Court expanded on the central holding of *Strauder*, ruling that "purposeful racial discrimination in [the] selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Id.* at 86. The Court further added that while the prosecutor normally has discretion in using peremptory challenges "for any reason at all... the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors... will be unable impartially to consider the State's case against a black defendant." *Id.* at 89.

Ultimately, the *Batson* Court found that "a defendant may establish a prima facie case of purposeful discrimination in [the] selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges." *Id.* at 96. In order to prove this, "the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Id.* In addition, "the overall facts [must] indicate [that] the prosecutor['s]" reason for using the challenges was to "exclude the veniremen from the petit jury on account of their race." *Id.* Finally, it should be noted that "the defendant is entitled to rely on the fact" that peremptory challenges create an opportunity for "those to discriminate who are of a mind to discriminate." *Id.* "This combination of factors" in the selection of a jury "raises the necessary inference of

purposeful discrimination." *Id.* If this standard has been met, "the burden [then] shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason." *People v. Lenix,* 187 P.3d 946, 954 (Cal. 2008). After all this, "the court determines whether the defendant has proven purposeful discrimination." *Id.*

Aside from race, courts have also wrestled with the use of peremptory challenges on the basis of other characteristics. With respect to the issue of gender, the Supreme Court in *Taylor v. Louisiana* struck down a section of the Louisiana State Constitution providing "that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service." *Taylor,* 419 U.S. at 523. In that case, it was ruled that the "systematic exclusion of women from jury panels" was a violation of the 6th Amendment's guarantee of a jury being comprised of a "representative cross-section of the community." *Id.* at 528. Further, in 1994, the Supreme Court explicitly stated in *J.E.B. v. Alabama ex rel. T.B.* that "the Equal Protection Clause prohibits discrimination in jury selection [and the use of peremptory challenges] on the basis of gender, or on the assumption that an individual will be biased in a particular case" due to their gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994).

More recently, the 9th Circuit Court of Appeals extended the *Batson* precedent to sexual orientation. In *SmithKline Beecham Corp. v. Abbott Laboratories,* the Court ruled that "equal protection prohibits peremptory strikes based on" that characteristic. *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 474 (9th Cir. 2014).

While the aforementioned cases only dealt with the specified issues of race, gender, and sexual orientation, the California Supreme Court had already determined as early as 1978 in *People v. Wheeler* "that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under... the California Constitution." *People v. Wheeler,* 583 P.2d 748, 761-62 (Cal. 1978). Notably, the *Wheeler* Court did not limit the scope of its decision to specified characteristics, but to "group bias" in general. *Id.* It rationalized its decision on the understanding "that in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of resident, and political affiliation." *Id.* at 755. It is therefore reasonable to assume that the California Supreme Court utilized the phrase "group

bias" in its broadest and most general form, in order to encapsulate segments and characteristics of the population that have no valid reason to be discriminated against for jury duty.

Recently, the use of the '*Batson/Wheeler* Challenge' has been altered by legislation in California. Perhaps in an effort to officially codify what *Wheeler* accomplished, A.B. 3070 § 231.7, which became effective on January 1, 2021, prohibits the use of peremptory challenges in criminal cases "on the basis of" a number of protected characteristics, including "race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation." Code Civ. Proc., § 226 (2021). In essence, A.B. 3070 § 231.7 legislatively affirms *Batson/Wheeler*, and specifies a range of new categories upon which peremptory challenges cannot be used.

In determining whether or not the peremptory challenge is valid, the California Legislature has guided courts to the standard of "an objectively reasonable person," and whether there is a "substantial likelihood" that they would view any of those listed characteristics as "factor[s] in the use of the peremptory challenge." *Id.* The statute defines "an objectively reasonable person" as an individual who "is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California." *Id.* Furthermore, the burden of a "substantial likelihood" implies "more than a mere possibility but less than a standard of more likely than not." *Id.* The factors that a court may utilize include those articulated in *Batson*, such as membership of a "perceived cognizable group" by either the "objecting party," "alleged victim," or "witnesses." *Id.* Other factors to be considered include a difference in questioning during voir dire between members of a "cognizable group" and non-members. *Id.*

In addition, A.B. 3070 § 231.7 lays out other reasons that are invalid for peremptory challenges, unless otherwise shown that "an objectively reasonable person would view the rationale as unrelated to the prospective juror's race, ethnicity," and other protected characteristics. *Id.* Some of these include an expression of "distrust... with law enforcement or the criminal legal system," one's neighborhood, their "ability to speak another language," and their "dress, attire, or personal appearance." *Id.*

The new legislation also shifts the burden of proof with respect to peremptory challenges. In *Batson*, the onus was on the challenging party to "establish a prima facie case of purposeful discrimination." *Batson*, 476 U.S. at 96. Indeed, "the ultimate burden of persuasion regarding

racial motivation rest[ed] with, and never shift[ed] from, the opponent of the strike." *People v. Lenix*, 187 P.3d 946, 954 (Cal. 2008). Now, the California Legislature has placed the burden onto the party that is exercising the peremptory challenge, insofar as they must "state the reasons the peremptory challenge has been exercised." Code Civ. Proc., § 226 (2021). Following this, "the court evaluate[s] the reasons given," and makes an ultimate determination on whether "there is a substantial likelihood that an objectively reasonable person would view" the aforementioned characteristics as "factor[s] in the use of the peremptory challenge." *Id.* This will undoubtedly make it easier to mount a '*Batson/Wheeler* Challenge,' since the moving party's burden has been severely lessened.

Due to the recency of A.B. 3070 § 231.7, case law is mostly unavailable regarding the legislation. In both *People v. Battle* and *People v. Ardoin*, the California Supreme Court and the California Court of Appeals, respectively, declined to review the legislation due to it not having gone into effect yet. Ultimately, A.B. 3070 § 231.7 has served to codify the *Batson/Wheeler* precedent, as well as extend it to an unprecedented array of categories and characteristics. How this will affect voir dire from a practical perspective, however, remains to be seen.

Applicant Details

First Name	**Alejandrea**
Last Name	**Brown**
Citizenship Status	**U. S. Citizen**
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Address	**Address** Street **982 15th AVE SE 7** City **Minneapolis** State/Territory **Minnesota** Zip **55414** Country **United States**
Contact Phone Number	**8322406975**

Applicant Education

BA/BS From	**University of Houston-Downtown**
Date of BA/BS	**December 2017**
JD/LLB From	**University of Minnesota Law School** **http://www.law.umn.edu**
Date of JD/LLB	**May 11, 2024**
Class Rank	**Below 50%**
Law Review/Journal	**Yes**
Journal(s)	**Minnesota Journal of Law and Inequality**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Barr, David
davidwbarr@gmail.com
7133219113
Matheson, John
mathe001@umn.edu
(612) 625-3879
Sweasy, Amy
swea0002@umn.edu

References

Michelle Blount, Service-Learning Supervisor
Harris County Juvenile Probation
(281) 451-7407

Pat Ogea, Librarian IV - Acquisitions Collection Manager
The Houston Public Library
(281) 639-1789

Joshua Cervantes – Senior Associate
Jackson Lewis
785-979-9254

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Alejandrea Brown

(She/her/hers)
(832)240-6975 | Brow6657@umn.edu

Dear James O. Browning July 4, 2023

I am a third-year student at the University of Minnesota Law School and am writing to express my interest in the Term Law Clerk position. As a diverse person, I find it vital to work with an employer whose values emphasize collaboration, focus on the community, and inclusivity. I am drawn to your organization because of the emphasis on innovation, fairness, and quality. I am confident I can contribute substantially to your chambers based on my background.

I am determined to become an excellent litigator and have actively pursued opportunities to hone my litigation skills. As a Certified Student Attorney of the Insurance Law Clinic, I developed valuable case and trial development strategies, client interviewing techniques, and oral argument skills. I led, argued, and secured a winning award against a prominent insurance company. As a law clerk for the Washington State Office of the Attorney General, I drafted a response to a personal restraint petition, and was proud to hear the oral argument on this response before the Washington State Supreme Court.

Previously, at Nichols Kaster, I researched complex civil litigation issues and prepared memoranda for filing. I worked with multiple associates and partners in various practice areas such as the Civil Rights, Impact Litigation, Employment and Labor, Financial Services, and Wage and Hour groups. The exposure to multiple practice areas and attorneys allowed for greater insight, collaboration, and various feedback methods, which helped me sharpen my legal writing, research, and analytics.

If I have the opportunity to join your chambers, I will be also eager to contribute my leadership and problem-solving skills. I co-founded and currently serve as the Secretary for the Minnesota Law Women of Color Collective. The Collective addresses the unique experiences of women of color students and practicing women of color attorneys and seeks to provide a safe space for relationship building, collaboration, and allyship. As Secretary, I led and organized our first-ever Women of Color Career Panel. I also serve as the Communications Director for the Black Law Student's Association (BLSA). I oversee all communication efforts and strategies to promote matters for BLSA. Lastly, as the Lead Online Editor of the Minnesota Journal of Law and Inequality, I aim to locate and advocate for diverse authors, post various topics, and allow for more inclusion in legal scholarship.

Before law school, I worked in Texas for the City of Houston, Harris County, and the Texas Department of Corrections. My positions required strong analytical and interpersonal skills, concise written communication, creativity, flexibility, resiliency, and the ability to adapt to the needs of different people in highly stressful situations. I learned to manage competing obligations by prioritizing appropriately and communicating effectively based on the audience's needs.

I am confident my experience and talent will positively impact your chambers and I look forward to scheduling an interview to discuss my qualifications further. If you require additional information, don't hesitate to contact me. I appreciate your consideration.

Best Regards,

Alejandrea Brown

Alejandrea Brown

(She/her/hers)
(832)240-6975 **|** brow6657@umn.edu

EDUCATION

University of Minnesota Law School, Minneapolis, MN, J.D. Anticipated, May 2024
Minnesota Journal of Law and Inequality, Lead Online Editor
Awards: Harry A. Blackmun Dean's Scholarship
Activities: Women of Color Collective, Secretary(Co-Founder)
Black Law Student Association, Communications Director

Tarleton State University, Stephenville, TX
M.P.A., May 2021

University of Houston - Downtown, Houston, TX
B.S., Criminal Justice, *magna cum laude*, December 2017

EXPERIENCE

Hennepin County Fourth Judicial District, Minneapolis, MN
Legal Intern for the Honorable Judge Jay Quam, anticipated September 2023 – December 2023

Racial Justice Clinic, University of Minnesota Law School, Minneapolis, MN
Certified Student Attorney, anticipated September 2023 – May 2024

Jackson Lewis, Overland Park, KS
Summer Associate, May 2023 – August 2023

Insurance Law Clinic, University of Minnesota Law School, Minneapolis, MN
Certified Student Attorney, Fall 2022 – April 2023
Argued, led, and achieved a winning judgment on behalf of an insurance client in a hearing to recover damages. Built and produced exhibits for litigation. Analyzed and determined best route of action for clients concerning recovery involving their insurance policies. Counseled and corresponded with clients about the statuses of their cases. Conducted client interviews. Conceptualized relevant factors of each case and applied relevant case law and policy interpretation to those factors.

Washington State Office of the Attorney General, Olympia, WA
Law Clerk, September 2022 – April 2023
Created a response to a personal restraint petition that was argued in front of the Washington State Supreme Court. Researched, responded, and devised pleadings, memoranda, and correspondence concerning Habeas Corpus and Civil Right complaints. Navigated preparation for litigation; discovery, and depositions. Drafted client advice memos and presented information to clients.

Nichols Kaster, Minneapolis, MN
Law Clerk, February 2022 – May 2023
Interpreted rulings, laws, and regulations for cases. Researched and analyzed relevant case law and statutory precedent. Teamed with partners and associates to prepare legal memoranda. Devised a summary judgment motion for a civil rights case. Developed a motion for preliminary approval for a class action suit.

Harris County Juvenile Probation, Houston, TX
Case Aide, January 2020 – June 2021
Forged partnerships with community agencies. Researched socioeconomic resources and raised awareness of community needs and shortcomings. Collaborated with project coordinators to supervise youth and administered community service hours. Coordinated training workshops. Completed applications for grant funding.

Harris County Community Services, Houston, TX
Disaster Recovery Case Manager, July 2019 – December 2019
Reviewed, researched, and analyzed Department of Housing and Urban Development's policies and local agency requirements regarding homeless and housing populations. Counseled and interviewed individuals and families requiring housing assistance. Secured necessities and disbursed funding for individuals.

Texas Department of Criminal Justice, Rosharon, TX
Case Manager II, March 2019 – June 2019
Coordinated and directed cognitive group therapy for incarcerated populations serving on administrative segregation. Managed communication between administration and correctional officers.

Harris County Community Supervision and Corrections, Houston, TX
Community Supervision Officer- DWI, March 2018 – August 2018
Managed adult probationers' cases to ensure compliance with court orders. Collaborated with court for high-risk case designations. Cultivated rapport with clients to better advocate for clients' needs. Identified local resources to meet client needs.

The City of Houston, Public Library, Houston, TX
Senior Data Entry Clerk, May 2017 – March 2018
Managed and processed library materials. Monitored library contracts ensuring cohesive performance. Consulted and negotiated with publishers. Led radio-frequency identification barcode tagging projects for older library materials.

University of Minnesota Unofficial Transcript

Name : Brown,Alejandrea
Student ID : 5755735
Birthdate : 9 - 3

Print Date: 05/23/2023

MOST RECENT PROGRAMS

Campus : University of Minnesota, Twin Cities
Program : Law School
Plan : Law J D
Degree Sought : Juris Doctor

* * * * * **Beginning of Law Record** * * * * *

Fall Semester 2021
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6001	Contracts	4.00	4.00	B-	10.668
LAW	6002	Legal Research & Writing	2.00	2.00	P	0.000
LAW	6005	Torts	4.00	4.00	B-	10.668
LAW	6006	Civil Procedure	4.00	4.00	C+	9.332
LAW	6007	Constitutional Law	3.00	3.00	C+	6.999
TERM GPA :	2.511	TERM TOTALS :	17.00	17.00	15.00	37.667

Spring Semester 2022
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6002	Legal Research & Writing	2.00	2.00	P	0.000
LAW	6004	Property	4.00	4.00	B-	10.668
LAW	6009	Criminal Law	3.00	3.00	B-	8.001
LAW	6013	Law in Practice: 1L	3.00	3.00	P	0.000
LAW	6018	Legislation and Regulation: 1L	3.00	3.00	B-	8.001
TERM GPA :	2.667	TERM TOTALS :	15.00	15.00	10.00	26.670

Fall Semester 2022
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6051	Business Associations/Corps	4.00	4.00	B-	10.668
LAW	6085	Criminal Procedure: Investigtn	3.00	3.00	C	6.000
LAW	6220	Poverty Law: Housing	3.00	3.00	B+	9.999
LAW	7008	CL: Insurance Law	3.00	3.00	A-	11.001
LAW	7202	Law & Ineqlty Jrnl: Rsch&Wrt	1.00	1.00	H	0.000
LAW	7623	Public Interest Field Placemnt	2.00	2.00	P	0.000
TERM GPA :	2.898	TERM TOTALS :	16.00	16.00	13.00	37.668

Spring Semester 2023
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6219	Evidence	3.00	3.00	C+	6.999
LAW	6249	Evidence Drafting	1.00	1.00	B+	3.333
LAW	6629	Indian Law	2.00	2.00	B-	5.334
LAW	6908	Criminal Justice	2.00	2.00	B	6.000
LAW	7008	CL: Insurance Law	3.00	3.00	A-	11.001
LAW	7202	Law & Ineqlty Jrnl: Rsch&Wrt	1.00	1.00	H	0.000
LAW	7623	Public Interest Field Placemnt	2.00	2.00	H	0.000
TERM GPA :	2.970	TERM TOTALS :	14.00	14.00	11.00	32.667

Fall Semester 2023
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6229	Criminal Procedure: Adjudicatn	3.00	0.00		0.000
LAW	6247	Depositions	2.00	0.00		0.000
LAW	6618	Trial Practice	3.00	0.00		0.000
LAW	7120	CL: Racial Justice Law	4.00	0.00		0.000
LAW	7200	Law & Inequality Jour Editor	2.00	0.00		0.000
TERM GPA :	0.000	TERM TOTALS :	14.00	0.00	0.00	0.000

Law Career Totals

CUM GPA:	2.748	UM TOTALS:	76.00	62.00	49.00	134.672
		UM + TRANSFER TOTALS:		62.00		

***** End of Transcript *****

Date Issued: 10-DEC-2018

Page: 1

Issued To: Alejandrea Brown
dutchiebrown@me.com

Course Level: Undergraduate

Current Program
College : No College Designated
Major : Major Not Declared

Record of: Alejandrea Brown
Student No: 900375091
Date of Birth: 03-SEP-1990

Comments:

Complete Common Core: YES

TSIP Status:

MTH completed	CMEA 027	09-APR-2009	
RED completed	CMRC 081	09-APR-2009	
WRT completed	CMSS 079	09-APR-2009	
ESY completed	CMWE 5	09-APR-2009	

Degree Awarded Bachelor of Science 15-DEC-2017
Primary Degree
Major : Criminal Justice
Minor : Psychology
Inst. Honors: Magna cum laude

SUBJ	NO.	CC	COURSE TITLE	CRED GRD	PTS R
INSTITUTION CREDIT:					
Fall 2015: 8/24-12/16					
CJ	2301		Police System	3.00 B	9.00
POLS	2306	070	Texas Government	3.00 C	6.00
	Ehrs: 6.00 GPA-Hrs: 6.00 QPts:			15.00 GPA:	2.50
Good Standing					
Spring 2016: 01/18-05/12					
CJ	2302		Criminal Court System	3.00 B	9.00
ENG	3302		Bus & Tech Report Writing	3.00 A	12.00
GEOL	1345	030	Oceanography	3.00 B	9.00
********** CONTINUED ON NEXT COLUMN **********					

SUBJ	NO.	CC	COURSE TITLE	CRED GRD	PTS R
Institution Information continued:					
STAT	1312	020	Statistical Literacy	3.00 B	9.00
	Ehrs: 12.00 GPA-Hrs: 12.00 QPts:			39.00 GPA:	3.25
Good Standing					
Summer II 2016: 06/06-07/28					
CJ	3300		Research Methods in CJ	3.00 A	12.00
	Ehrs: 3.00 GPA-Hrs: 3.00 QPts:			12.00 GPA:	4.00
Good Standing					
Summer III 2016:07/11-08/11					
UHD	2301	090	University Seminar-Commun	3.00 B	9.00
	Ehrs: 3.00 GPA-Hrs: 3.00 QPts:			9.00 GPA:	3.00
Good Standing					
Fall 2016: 8/22-12/14					
CJ	3306		Crime & Delinquency	3.00 A	12.00
CJ	3311		Ethics in Criminal Justice	3.00 B	9.00
CJ	4314		Women and the CJ System	3.00 A	12.00
PSY	3312		Positive Psychology	3.00 B	9.00
	Ehrs: 12.00 GPA-Hrs: 12.00 QPts:			42.00 GPA:	3.50
Dean's List					
Good Standing					
Spring 2017: 1/17-5/11					
CJ	3301		Criminology	3.00 A	12.00
CJ	3302		Crim Investigation	3.00 A	12.00
CJ	4390		Child Abuse & Neglect	3.00 A	12.00
	Ehrs: 9.00 GPA-Hrs: 9.00 QPts:			36.00 GPA:	4.00
Dean's List					
Good Standing					
Summer II 2017: 6/5 - 7/27					
CJ	4305		Evidence-Based Corrections	3.00 A	12.00
CJ	4370		Senior Seminar in CJ	3.00 A	12.00
	Ehrs: 6.00 GPA-Hrs: 6.00 QPts:			24.00 GPA:	4.00
Good Standing					
********** CONTINUED ON PAGE 2 **********					

Daniel Villanueva
Assistant Vice President for Enrollment Management and Registrar

From University of Houston-Downtown to dutchiebrown@me.com on 12/10/2018 06:58 PM TRAN0000015739480

Student No: 900375091 Date of Birth: 03-SEP-1990 Date Issued: 10-DEC-2018

Record of: Alejandrea Brown
Level: Undergraduate

From University of Houston-Downtown to dutchiebrown@me.com on 12/10/2018 06:58 PM TRAN0000015739480

SUBJ	NO.	CC	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:							
Fall 2017 8/21-12/13							
CJ	3316		Victimology	3.00	A	12.00	
CJ	3318		Sex Crimes	3.00	A	12.00	
CJ	3320		Statistics for CJ	3.00	A	12.00	
PSY	3322		Abnormal Psychology	3.00	A	12.00	
PSY	4306		Theories of Personality	3.00	A	12.00	
	Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 60.00 GPA: 4.00						
Dean's List							
Good Standing							

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	66.00	66.00	237.00	3.59

*
TEC 51.907 Undergraduate Course Drop Counter: EXEMPT
*
********** END OF TRANSCRIPT **********

Daniel Villanueva
Assistant Vice President for Enrollment Management and Registrar

UNIVERSITY OF HOUSTON – DOWNTOWN (UHD)

Registrar's Office	One Main Street	http://www.uhd.edu
(ph): 713-221-8999	Houston, Texas 77002	Title IV Code: 003612
(fax): 713-223-7438	uhdrecords@uhd.edu	FICE Code: 012826

Accreditation
The University of Houston – Downtown (UHD) is accredited to award Bachelor's and Master's degrees by the Commission on Colleges of the Southern Association of Colleges and Schools.

History
In 1974, the University of Houston System took over the assets of South Texas Junior College. All coursework represented on a UHD transcript prior to the fall semester of 1974 was earned at South Texas Junior College. In 1979, the Texas Legislature granted the University of Houston Downtown College status as a freestanding academic institution under the Board of Regents of the University of Houston System. In 1983, the institution's name was changed to the University of Houston – Downtown (UHD)

Academic Credit/Calendar
The unit of credit awarded by UHD is the semester credit. UHD operates the academic calendar based on the semester term. Semester credits are awarded during the following established terms: Fall and Spring (16 week), Summer I, II, and III (5-8 week). Other terms may be periodically approved and utilized, such as the Winter Term or May Term (3 week).

Grading Scale
UHD operates on a 4.0 grading scale. The grade point average (GPA) is determined by dividing the total quality points by the total number of GPA credit hours earned.

Included in the calculation of the GPA:

GRADE		Q. PTS.
A	Superior	4.00
B	Above Average	3.00
C	Average	2.00
D	Below Average	1.00
F	Failure	0.00

NOT included in the calculation of the GPA

GRADE		Q.PTS.
A*	Non-credit grade	0.00
B*	Non-credit grade	0.00
C*	Non-credit grade	0.00
I	Incomplete	0.00
IP*	In progress	0.00
W	Withdrawn	0.00
S	Satisfactory	0.00
U	Unsatisfactory	0.00
AUD	Audit	0.00
CA	Credit Awarded	0.00

Repeated Courses
UHD has operated under various repeat rules. Effective the spring semester of 1994, when a course is repeated only the most recent grade received in the course will be used in computing the grade point average. This excludes courses repeated prior to Spring 1994. In the column marked "R", repeats that are included in the GPA are marked "I", those that are excluded are marked "E".

Codes and Abbreviations
The following are codes commonly found on the transcript and their definitions:

SUBJ ..... Subject	GRD ..... Grade	Ehrs ..... Earned Hours
CRED..... Credits	GPA-Hrs ..... GPA Hours	R ..... See "Repeated Courses"
NO..... Course Number	PTS..... Quality Points	I ..... See "Repeated Courses"
CC..... Course Category	QPts..... Quality Points	E .....See "Repeated Courses"

Course Numbering System
All course numbers are four digits, the first representing academic level (1=freshman, 2=sophomore, 3=junior, 4=senior, 5=postbac, 6=master's) and the second digit representing the credit-hour value.

Academic Amnesty Program
Undergraduate students may elect under the Academic Amnesty program to have all academic coursework completed four or more years prior with a grade of 'D' or 'F' at UHD to be removed from consideration for degree candidacy. In the column marked "R", those grades that are excluded are marked "E".

Fresh Start Program
For students who are approved to be admitted under the fresh start program, the university shall not consider academic course credits or grades earned by the applicant ten or more years prior to the starting date of the semester in which they seek to enroll. In the column marked "R", those grades that are excluded are marked "E".

Academic Standing: Probation/Suspension
A student is placed on academic probation at the end of any term in which his or her cumulative GPA falls below the specified minimum cumulative GPA as shown below:

Semester Hours:	Cum. GPA Minimum:
1-29	1.70
30-59	1.90
60+, or declaration of major	2.00

A student who is not making satisfactory progress toward meeting graduation requirements may be placed on academic suspension if the record does not improve.

State of Texas Common Core
The State of Texas has established a "general education core curriculum" for public institutions as of Fall 1999. Coursework which has been completed in a designated core category will be notated on the transcript as follows:

010 – Communications	040 – Humanities	070 – Political Science
011 – Speech	050 – Visual & Perf. Arts	080 – Social/Behavioral Science
020 – Mathematics	060 – History	090 – Institutional Option
030 – Natural Sciences		

The completion status of UHD's general core curriculum will be indicated on the transcript as follows:
Complete Common Core: YES Complete Common Core: NO

Texas Success Initiative (TSI)
The TSI status of all students is printed on the transcript. THEA (or alternative) scores are printed for each section with the date of the attempt. Exemptions are also noted for each section. TSI satisfaction at another institution is indicated by the name of the school being printed for the appropriate section.

Course Drop Limit – TEC 51.907
Effective Fall 2007, undergraduate students enrolled at the University of Houston-Downtown are not permitted to drop more than six courses. The six drop limit includes any course a transfer student has dropped at another institution of higher education, per section 51.907 of the Texas Education Code.

SERVICE LEARNING COURSE DESIGNATION
Service learning is a teaching and learning strategy that integrates meaningful community service with instruction and reflection to enrich the learning experience, teach civic responsibility, and strengthen communities (Learn and Serve America National Service Learning Clearinghouse). Service-learning aims to connect the personal and intellectual to help students acquire knowledge and a useful understanding of the world, build critical thinking capacities, and perhaps lead to fundamental questions about learning and about society and to a commitment to improve both.

ACADEMIC ACHIEVEMENT THROUGH COMMUNITY ENGAGEMENT (A+CE)
Focusing on critical thinking skills using community issues/engagement.

ENGAGED SCHOLAR
An Engaged Scholar has successfully completed at least four A+CE (Academic Achievement through Community Engagement) designated courses that build critical thinking skills using community issues.

From University of Houston-Downtown to dutchiebrown@me.com on 12/10/2018 06:58 PM TRAN0000015739480

Alejandrea Brown
*****0123 03-SEP

TARLETON STATE UNIVERSITY
Stephenville, Texas 76402

Course Level: Graduate

Current Program
Master of Public Administratio
College : Liberal & Fine Arts
Major : Public Administration
Maj/Concentration : Professional

Awarded Master of Public Administratio 15-MAY-2021
Curriculum
College : Liberal & Fine Arts
Major : Public Administration
Maj/Concentration : Professional

SUBJ NO.	COURSE TITLE	CRED GRD	PTS R
INSTITUTION CREDIT:			
Spring 2019			
Liberal & Fine Arts			
Public Administration			
MAPA 5300	Public Administration	3.00 B	9.00
MAPA 5301	Org Behavior in the Pub Sec	3.00 A	12.00
Ehrs: 6.00 GPA-Hrs: 6.00 QPts: 21.00 GPA: 3.50			
Good Standing			
Summer 2019			
Liberal & Fine Arts			
Public Administration			
MAPA 5331	Public Policy	3.00 B	9.00
MAPA 5398	Research Methods	3.00 Q	0.00
Ehrs: 3.00 GPA-Hrs: 3.00 QPts: 9.00 GPA: 3.00			
Good Standing			
Fall 2019			
Liberal & Fine Arts			
Public Administration			
MAPA 5315	Public Budgeting	3.00 B	9.00
MAPA 5398	Research Methods	3.00 A	12.00
Ehrs: 6.00 GPA-Hrs: 6.00 QPts: 21.00 GPA: 3.50			
Good Standing			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO.	COURSE TITLE	CRED GRD	PTS R
Institution Information continued:			
Spring 2020			
For Spring 2020, due to COVID-19, any F, FX, F0 grades are excluded from GPA calculations for all students. D grades are excluded for Graduate students. PC indicates a grade of C or Better for Undergraduates. P indicates a grade of C or Better for Graduate students.			
Liberal & Fine Arts			
Public Administration			
MAPA 5307	Statistical Methods	3.00 B	9.00
MAPA 5311	Intergovernmental Relations	3.00 A	12.00
Ehrs: 6.00 GPA-Hrs: 6.00 QPts: 21.00 GPA: 3.50			
Good Standing			
Summer 2020			
Liberal & Fine Arts			
Public Administration			
MAPA 5302	Human Res Mgmt in the Pub Sec	3.00 B	9.00
MAPA 5322	Advanced Ethics	3.00 A	12.00
Ehrs: 6.00 GPA-Hrs: 6.00 QPts: 21.00 GPA: 3.50			
Good Standing			
Fall 2020			
Liberal & Fine Arts			
Public Administration			
MAPA 5340	Critical Incident Management	3.00 A	12.00
MAPA 5345	Social Problems	3.00 A	12.00
Ehrs: 6.00 GPA-Hrs: 6.00 QPts: 24.00 GPA: 4.00			
Good Standing			
Spring 2021			
Liberal & Fine Arts			
Public Administration			
MAPA 5350	Capstone	3.00 B	9.00

********** CONTINUED ON PAGE 2 **********

David Sutton
David Sutton, Registrar

982 15TH AVE SE 7
REFNUM:61078326
MINNEAPOLIS, MN 554142445

Alejandrea Brown
*****0123 03-SEP

TARLETON STATE UNIVERSITY
Stephenville, Texas 76402

Graduate

SUBJ NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:					
MAPA 5385	Seminar: Diversity Mgmt.	3.00	A	12.00	
Ehrs: 6.00	GPA-Hrs: 6.00	QPts: 21.00		GPA: 3.50	
Good Standing					

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	39.00	39.00	138.00	3.54
TOTAL TRANSFER	0.00	0.00	0.00	0.00
OVERALL	39.00	39.00	138.00	3.54

********** END OF TRANSCRIPT **********

David Sutton
David Sutton, Registrar

This transcript processed and delivered by Credentials' TranscriptsNetwork

Tarleton State University

Office of the Registrar, Box T-0620, Stephenville, TX 76402, FICE No. 003631; (254) 968-9121

Transcript Key

ACCREDITATION

Tarleton State University is accredited by the Southern Association of Colleges and Schools Commission on Colleges to award associate, baccalaureate, masters, and doctorate degrees. Contact the Southern Association of Colleges and Schools Commission on Colleges at 1866 Southern Lane, Decatur, Georgia 30033-4097 or call 404-679-4500 for questions about the accreditation of Tarleton State University.

GRADING SYSTEM

Tarleton State University is on a 4 point grading system. The following grade notations are used in calculating the Grade Point Average (GPA – the quotient of quality points divided by quality hours).

Grade		Quality Points per hour credit
A	Excellent	4.0
B	Good	3.0
C	Fair	2.0
D	Passing	1.0
F	Failing	0.0
F0	Failing	0.0
FX	Failing	0.0
I	Thesis in Progress	0.0 Not Used in GPA Computation
K	Incomplete*	0.0 Not Used in GPA Computation
Z	In Progress	
	Graduate Only	0.0 Not Used in GPA Computation
P	Pass	0.0 Not Used in GPA Computation
S	Satisfactory	0.0 Not Used in GPA Computation
U	Unsatisfactory	0.0 Not Used in GPA Computation
Q	Drop	0.0 Not Used in GPA Computation
W	Withdrawal	0.0 Not Used in GPA Computation
WF	Withdrawal Failing	0.0 Computed Same as "F"
N	No Grade	0.0 Not Used in GPA Computation

*Grade of "K" becomes "F" if not completed by the end of the succeeding long semester.

SEMESTER HOURS

One lecture period of fifty minutes per week for 15 weeks is one semester hour. Two hours of laboratory work is usually equivalent to one hour of lecture.

LENGTH OF SEMESTER

The regular Fall and Spring semesters are 15 weeks each.

COURSE NUMBERING SYSTEM

Tarleton State University's course numbering system has alternated between a 3-number and a 4-number system.

100-199 or 1000-1999 Undergraduate – Freshman Level
200-299 or 2000-2999 Undergraduate – Sophomore Level
300-399 or 3000-3999 Undergraduate – Junior Level
400-499 or 4000-4999 Undergraduate – Senior Level
500-599 or 5000-5999 Graduate Level
600-799 or 6000-7999 Doctorate Level

REPEATED COURSES

Tarleton State University allows a student to repeat courses previously taken at the University and the highest grade will be included in the GPA. All courses and grades remain on the transcript and those included in the GPA will have an "I" designation beside the course(s) and those excluded from the GPA will have an "E" designation beside the course(s).

DEVELOPMENTAL COURSES

The following courses at Tarleton State University are considered developmental/remedial in nature, do not count for degree credit and are not transferable. DGS 100/GSTU1100, ENGL 100/0303, MATH 001/0301, MATH 002/0302, MATH 100/0303, MATH 101/0304, RDG 100/READ 0303, UNIV 204/0204, UNIV 301/0301.

HONORS COURSES

Honors courses are designated by the word "HONORS".

TRANSFER CREDIT

Transfer courses from accredited institutions are evaluated and all acceptable courses appear on the transcript. A maximum of 68 semester hours of academic credit will be accepted from two-year institutions, unless stipulated in applicable program specific articulation agreements.

ACADEMIC STANDING

WARNING /PROBATION: Students placed on warning/probation will be designated by a "Warning" or "Probation" indication which is printed following the term for which they were placed on warning/probation. Students on warning/probation may continue in school as long as they meet the requirements of the warning/probation.

SUSPENSION: Students suspended from the University will be designated by a "Suspended" indication which is printed following the term for which they were suspended. The academic standing will remain with the term in which it was instated.

TRANSCRIPT VALIDATION

An official transcript is printed on secure paper and will have the Registrar's signature printed on the front of the transcript. Copies issued to students will have "ISSUED TO STUDENT" stamped in RED on the transcript.

Federal Law Prohibits Access to This Record By Any Party Without Written Consent of the Student

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500 Crawford Street, #601
Houston, Texas 77002
July 5, 2023

Dear Judge :

It is my pleasure to strongly recommend Ms. Alejandrea Brown as a law clerk with your court. Ms. Brown and I have known each other for approximately six years. We talk almost daily, and we have developed a close friendship and mentor-mentee relationship. Ms. Brown's skills and qualities jump off the page. When we first met, I was struck by her intelligence and immediately saw in her the intelligence and critical-thinking skills to become an exceptional attorney.

Early on, I told Ms. Brown that she "thought like an attorney." Ms. Brown then began to examine a career in law. Ms. Brown was not happy just to get into law school. She wanted to attend a top law school. I was pleased, but not surprised, at the number of admission offers she received. Ms. Brown also received a considerable number of scholarship offers.

Ms. Brown has an amazing ability to construct an argument. She quickly, and correctly, identifies issues and makes concise, persuasive arguments. More amazing is her ability to dissect elements of another's argument, legal or otherwise, attack or support each element, and then reassemble the parts into a coherent and persuasive whole.

When Ms. Brown started at the University of Minnesota, I tried to impress upon her that legal research and writing would be the most important class of her law school career. Ms. Brown took my advice to heart. I would give her "assignments" to find obscure cases on Westlaw—she always found them. Ms. Brown trusted me to review her writing assignments, and I always found her legal writing to be exceptional. I was pleased, but not surprised, when Ms. Brown joined the Minnesota Journal of Law and Inequality.

I have been practicing as an appellate attorney for more than thirty years, and I have twice been before the Supreme Court of the United States. *White v. Wheeler*, 136 S.Ct. 456 (2015) (per curiam) and *Moore v. Texas*, 139 S.Ct. 666 (2019) (per curiam). So I fancy myself a fair judge of legal research and writing talent. Ms. Brown is an exceptional talent. She would make a great addition to your office.

Very Truly Yours,

/s/ David W. Barr
Kentucky Bar #83791
Texas Bar #24095294

July 05, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I write unconditionally and with great enthusiasm to recommend Alejandrea Brown for your judicial clerkship, a statement I do not lightly make given my forty years of teaching top-notch students here at the University of Minnesota Law School. Alejandrea is special--truly a complete package of talent, skill and personality.

Alejandrea's academic résumé speaks for itself—a magna cum laude graduate of the University of Houston with a degree in Criminal Justice, a Masters of Public Administration degree from Tarleton State University, and a successful career here at Minnesota Law, including Lead Online Editor for the Minnesota Journal of Law and Inequality. Her experiential resume is equally impressive—several pre-law school public sector positions with Harris County in Texas, as well as stints with the Washington State Office of the Attorney General and a private sector employment and civil rights law firm. The rest you can read for yourself. Her breadth of interests and experience are amazing.

What is not on Alejandrea's resume are the qualities that make her a leader. She is perceptive and articulate both in presenting her own views and in raising concerns about the positions of others. More important, she displays the sense of professional responsibility which we expect from members of our profession. Others respect her viewpoint and opinions. Alejandrea leads by example.

I have gotten to know Alejandrea better than most students. I have known her from her first days in my Contracts course. I was impressed with her interest in the subject and willingness to push hard for answers to her questions. Her work ethic is exemplary. She was always prepared and participated with substantial skill in the class. Her written and oral presentation skills are excellent.

I have had opportunities to discuss a variety of subjects with Alejandrea. I have served as an informal mentor to her. She is a mature, team player with great personal drive and sincere empathy and compassion. In summary, I have absolutely no doubt that Alejandrea has the analytical, communication and interpersonal skills necessary to the mutual success of the judicial clerkship experience.

Sincerely,
John H. Matheson
Law Alumni Distinguished Professor of Law
Director. Corporate Institute

John Matheson - mathe001@umn.edu - (612) 625-3879

July 11, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I write to offer my enthusiastic recommendation for Ms. Alejandrea Brown for a clerkship position in your court. I had the pleasure of having Ms. Brown in two classes last spring semester at the University of Minnesota Law School and will work with her again in my Trial Practice class this fall. In addition to her well-demonstrated academic talent in our traditional Evidence class, I had the opportunity to observe her work in a small, 12-person experiential class called Evidence Drafting. The class requires students to assess and respond to evidentiary questions and motions and then perform in class as a party or a judge. Having been a trial attorney for 28 years, I can attest that the class is extremely realistic in that it intentionally gives a short time to prepare and requires the on-your-feet thinking that courtroom lawyers need to use every day. The students who sign up for this course typically have a level of maturity and, frankly, bravery, in being willing to try out and develop their skills week after week. Ms. Brown distinguished herself in a fine group of students with thoughtful preparation, an ability to change course in response to unexpected arguments from opposing counsel, and impressively asked the appropriate questions in her role as judge. The course also had a significant writing component, and Ms. Brown's skills in that area give me every reason to believe she will produce excellent written work as a judicial clerk.

I have also spent time with Ms. Brown outside the classroom and learned about her impressive background and other skills she would bring to her assignment as your clerk. One of the things that I find most remarkable about Ms. Brown is her demonstrated interest in many areas of the law. As you will see from her resumé, Ms. Brown has done both criminal and civil work, worked as a juvenile probation officer, and worked in the University's Insurance Law Clinic. I believe these varied interests and Ms. Brown's willingness to pursue them separate her from many students who might have a preconceived or limited idea of what working in certain areas of the law is like and who are therefore less adventurous in their pursuit of opportunities to gain valuable experience as a student. Ms. Brown's wide-ranging interests and experience will, I believe, make her an outstanding judicial clerk because she will be interested in and prepared to handle work in the many subjects that present in federal district court every day.

I was delighted to learn that Ms. Brown was interested in pursuing a clerkship after she graduates next spring. Not only will she gain valuable experience that will serve her throughout her career, but you will have the opportunity to work with a very capable, smart, engaged, and interesting future member of the legal community. I am certain you have many fine candidates to choose from but ask that you give Ms. Brown your most serious consideration. I would be happy to speak with you further or answer any questions you may have. Please contact me at the email address or phone number provided above. Thank you for the opportunity to provide this recommendation.

Sincerely,
Amy E. Sweasy
University of Minnesota Law School – Adjunct Professor of Law – Evidence, Evidence Drafting, Trial Practice

SEGMENTATION OR INCLUSIVITY: MAJORITY OPINION DIVERTS FROM TRADITION LEAVING LOWER COURTS TO FEND FOR THEMSELVES IN *EBERLINE V. DOUGLAS J. HOLDINGS INCORPORATED*.

Introduction:

Joy Eberline, Tracy Poxson, and Cindy Zimmermann sued Douglas J. Holdings, Inc. ("Douglas J.") for compensation concerning work performed during their time in school under the Fair Labor Standards Act ("FLSA"). [1] Douglas J. operated licensed cosmetology schools in Michigan where students worked towards the 965-hour practical experience requirements set by the state. [2] Licensed instructors assisted and observed the students who worked in the salons to evaluate their performance. [3] Instructors assigned students cleaning tasks for which refusal by a student resulted in being sent home for the day. [4] The assigned tasks appeared to be related to the training of students for cosmetology purposes while other tasks appeared to be less related to the schools purpose.[5]

The plaintiffs argued that the cleaning and janitorial activities were not included in the curriculum or the state of Michigan's requirements. [6] The district court granted partial summary judgment for the plaintiffs' because the janitorial activities were far removed from the educational relationship between the parties. [7] The Court of Appeals remanded the case because the district court failed to correctly apply the primary beneficiary test to the plaintiffs' motion for partial summary judgment.[8]

The FLSA requires that employers pay employees a minimum wage. [9] The overall question the district court must decide is whether students at Douglas J's cosmetology school are employees.[10] The court of appeals decision addressed two issues: (1) if the application of the

primary beneficiary test is necessary when the work at issue is not part of the school's educational curriculum. [11] (2) whether to apply the primary beneficiary test to a targeted segment of the program or to the educational program as a whole.[12]

This comment demonstrates that although the court of appeals remanded the case for the district court to apply the analysis they desired, the court misconstrued or misused precedent. Part I explains expectations of the FLSA and other pertinent history concerning how courts determine whether a student is an employee. Part II examines *Eberline* and summarizes the courts findings. Part III examines complexities of other circuit court findings involving similar issues and discusses the majority holding and its impact on future court decisions.

I. Background

Historically, the FLSA prohibited individuals from performing uncompensated work or services for the benefit of for-profit sector businesses. [13] The Department of Labor ("DOL") stated that it would apply the test the Supreme Court set out in *Portland Terminal* to determine if individuals were employees or trainees.[14] Congress has failed to enact any statutory provisions that would codify the trainee exception within the FLSA. [15] Despite the Portland Terminal Test factors present within the DOL's Fact Sheet #71, court interpretations vary.[16] Most courts reject the literal application of the Fact Sheet's criteria. [17] Moving away from the DOL's interpretation of the Portland Terminal Test, courts have claimed either the test is too rigid, granted some deference, or deferred the tests requirements altogether. [18]

Interns and students may not be "employees" under the FLSA. [19] The primary-beneficiary test determines whether an intern is, in fact, an employee under the FLSA. [20] Courts have applied the primary beneficiary analysis which represented applications of the Supreme

Court's economic realities test to which the courts also evaluated the totality of the circumstances in each situation, as the Supreme Court directed.[21] The primary-beneficiary test maintains the purpose of the FLSA and provides courts with flexibility to prevent employers from abusing workers. [22] The test allows courts to examine the economic reality of the intern employer relationship to determine which party is the primary beneficiary of the relationship.[23] The beneficiary test allows courts to measure the extent to which the school meets FLSA expectations against the economic benefits received by the school. [24] Courts have decided applying these considerations requires deliberation of all circumstances. [25] Courts have also found that the Portland Terminal Test is inconsistent with the totality of the circumstances approach.[26]

II . Case Description

In *Eberline*, the Sixth Circuit held that before reaching the primary beneficiary analysis they must answer two questions: (1) is the primary beneficiary test applicable when the work at issue is not part of the school's educational curriculum. [27] (2) Is the primary beneficiary test applicable to a segment of the program at issue or to the educational program as a whole.[28] The court used precedent from *Laurelbrook* to analyze the context in *Eberline*. The Laurelbrook Test held that to determine whether an employment relationship exists in the context of learning situation is to establish which party derives the primary benefit from the relationship.[29] The court looked to factors such as: whether the purported employee had an expectation of compensation, displacement of employees, or derived educational value from work. Conditional factors may be considered if they shed light on which party primary benefits from the relationship. [30]

The court concluded that the primary beneficiary test applied because the tasks the students completed derived from their relationship with Douglas J. [31] For instance, students participated in salons, completed assigned tasks issued by the same instructors, and received academic credit for time spent on the tasks. Students would also be sent some which potentially delayed their graduation if they failed to complete assigned tasks. [32] The court concluded that when plaintiffs' assert an entitlement to compensation based only on a portion of the work performed in the context of an educational relationship, courts should apply the primary beneficiary test to only that part of the relationship, not to the broader relationship. [33] The court reasoned the primary beneficiary test allows courts to separate claims brought by students who are merely doing the work their curriculum requires from those doing work that does not provide a similar curriculum-based benefit. Additionally, by adopting a proposed approach to the entirety of the educational program as opposed to the portion of the program actually at issue, it runs counter to the purpose of the primary beneficiary test. [34]

III. Analysis Section.

A. The majority opinion misconstrued *Laurelbrook*.

The majority relied heavily on *Laurelbrook* for its determination on how to correctly apply the primary beneficiary test. It is questionable if the majority opinion reached the correct analysis due to the present circuit split involving the entirety of circumstances within a student and education provider relationship. The court in *Laurelbrook* addressed if the district court used the correct legal standard which was to determine which party received the primary benefit of the work performed by students at Laurelbrook.[35] Specifically, the primary beneficiary test provided a framework for discerning employee status in learning or training situations by focusing on the

contextual benefits flowing to each party. [36] Lastly, the court concluded in *Laurelbrook* that additional factors that bear on the inquiry should also be considered as long as they shed light on which party primarily benefits from the relationship. [37] Despite this reliance on *Laurelbrook*, the majority held that the district court correctly reached its initial conclusion by focusing on segmented duties the students completed instead of the entirety of the student and school relationship which *Laurelbrook* emphasized.

B. The Majority Court Creates more Confusion to Precedent by Narrowing the Application of when to Apply the Primary Beneficiary Test.

The court deviates from the totality of circumstances approach despite other circuits deliberating on the totality of circumstances.[38] The majority claimed that sister circuits also considered similar claims that used a targeted approach which focused on segments of work at issue. [39] The deviation by the majority occurs despite other circuits' looking to precedent within *Laurelbrook* to which their interpretations rely on totality of the circumstances. [40] The court in *Glatt* held that applying consideration requires weighing and balancing all of the circumstances. [41] The court in *Benjamin* followed *Portland Terminal* by applying a four-part economic reality test that looked to the totality of the circumstances. [42] Implications from Supreme Court decisions *Portland Terminal* and *Rutherford Food Corp. v. McComb* emphasize determination of the circumstances include the entire activity, not the segmented approach that the majority concluded. In *Alamo,* the Supreme Court analyzed all circumstances holding that the test of employment was one of economic reality. [43] The majority opinion focuses on a segmented portion of the work the students completed which seemingly narrows the application found within the courts prior precedent.[44]

C. The Majority Opinion Fails to Provide a Solution to the Lower Court by not Reaching a Decision Involving their own Analysis.

The majority stated explicitly that its decision was not meant to establish whether or not the plaintiff or defendant would win but to provide clarification on how to correctly determine when and if the primary beneficiary test applied in specific situations.[45] This inaction presents an issue because circuit courts are currently split on what standard to apply to this exact situation. [46] Actions by the majority further adds to the litigation pool and the complexities surrounding how to decide on this issue because the primary beneficiary test itself is difficult to discern without any specific factors. [47] The decision by the majority creates additional conflict with other circuits and does not contribute positively to case law because it further muddies an already complex situation. [48] To protect against further confusion, complexity, and litigation, the majority ought to consider the future implications of deciding to remand a case for further analysis especially under the narrow application it considered because it seemingly deviates from Supreme Court precedent.

Conclusion

In *Eberline*, the Sixth Circuit held that the primary beneficiary test may be applied specifically to a segment of a vocational training program. [49] The court concluded that the district court should not consider benefits that come from a different part of the broader relationship that is not connected to the specific issue at hand. [50]

The court ultimately remanded the case to the district court despite misconstruing its prior precedent in *Laurelbrook*. *Eberline* ignores practical considerations with its decision and fails to take into consideration how muddied case law is in this instance. The court created

further divide in circuit court by adopting a segmented approach in lieu of the totality of circumstances. The court should have followed *Laurelbrook* as is to provide stability to its sister circuits and stable guidance to district courts.

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[1] *Eberline v. Douglas J. Holdings, Inc.*, 980 F.3d 1008, 1008 (6th Cir. 2020).

[2] *Id.* at 1009

[3] *Id.* at 1010

[4] *Id.* at 1011

[5] *Id.* at 1010

[6] *Id.* at 1011

[7] *Id.* at 1012

[8] *Id.* at 1018

[9] *Id.* at 1012

[10] *Id.*

[11] *Id.* at 1013

[12] *Id.*

[13] Paul Budd, *All Work and No Pay: Establishing the Standard for When Legal, Unpaid Internships Become Illegal, Unpaid Labor*, 63 U. KAN. L. REV. 452, 641 (2015) (explaining the exception to this rule is the trainee exception established in *Walling v. Portland*).

[14] Natalie Bacon, *Unpaid Internships: The History, Policy, and Future Implications of "Fact Sheet #71,"* 4 Ohio State Entrepreneurial Bus. L. J. 67, 73 (2011).

[15] Budd, supra, at 462 (explaining the DOL has not enacted any formal regulations that interpret when a worker is trainee or intern under the FLSA).

[16] Bacon, supra, 74.

[17] *Robert J. Tepper & Matthew P. Holt, Unpaid Internships: Free Labor or Learning Experience?,* 2015 BYU Educ. & L. J. 323, 334 (2015) (explaining that courts instead adopt a "totality of the circumstances" or an "economic realities" test).

[18] *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1202, 1209 (11th Cir. 2015) (explaining the courts preference to taking their own guidance on the issue directly from Portland Terminal and not the DOL's interpretation of it).

[19] U.S. Dep't of Lab. Wage and Hour Div., *FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT* (2018).

[20] *Id.*

[21] See *Benjamin v. B & H Education, Inc.*, 800 F.3d 1142, 1147 (9th Cir. 2017) (explaining their agreeance with decisions that the primary beneficiary test because it captures the Supreme Court's economic realities test in the student/employee context).

[22] *Hilary Weddell, Vocational Schools Are No Vacation: Determining Who Really Benefits From Student Labor*, 32 B.C. J. L. & Soc. Just. 71, 74 (2012) (explaining the purpose of the FLSA was to prevent employers from manipulating children into working for free and displacing entry-level workers.).

[23] *Velarde v. GW GJ, Inc.*, 914 F.3d 780, 785 (2d Cir. 2019) (explaining the test necessary to decipher the benefits received by the school and the trainee who either serves as an employee of the school or primarily as a student).

[24] *Id.*

[25] *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 531, 537 (2d Cir. 2016) (explaining no one factor is dispositive and every factor need not point in similar directions for the court to conclude that an intern is not an employee.).

[26] *Solis v. Laurelbrook Sanitarium & School, Inc.*, 600 F.2d 519, 525 (6th Cir. 2011) (explaining the DOL's test to be a poor method for determining employee status).

[27] *Eberline,* 980 F.3d at 1013

[28] *Id*. at 1013

[29] *Id.*

[30] *Id.*

[31] *Id.* at 1014.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 1016

[35] *Solis,* 600 F.2d at 526

[36] *Id.* at 528

[37] *Id.* at 529

[38] *Eberline,* 980 F.3d at 1014 (explaining how their analysis focused exclusively on the work that was the subject to the case… did not consider the unchallenged parts of the program).

[39] *Id.* at 1015 (explaining how the Ninth and Seventh Circuit's analysis focused on how both cases rejected the claims of the plaintiffs not because they were primary beneficiaries of the entire relationship but because they received the primary benefit from the segments of the relationship that were in dispute).

[40] *Benjamin*, 800 F.3d at 1147 (explaining how sister circuits evaluated the totality of circumstances of each case as the Supreme Court has directed).

[41] *Glatt*, 811 F.3d at 537

[42] *Benjamin*, 800 F.3d at 1145 (explaining following Alamo and Portland Terminal … when determining whether individuals are employees under the FLSA).

[43] Tepper & Holt, supra, at 335 (explaining how the Supreme Court analyzed all of the circumstances of the situation concluding that the work the students were doing directly supported a commercial enterprise that was in direct competition with business that paid their workers).

[44] *Eberline*, 980 F.3d at 1026 (the dissent explaining that the primary beneficiary analysis makes a broader inquiry, that focuses on the benefits accrued to each party by virtue of the educational and working relationship).

[45] *Id.* 1018 (explaining that the lack of exceptional circumstances will not warrant a decision from the court on behalf of the parties).

[46] Budd, supra, at 465 (explaining how courts are undecided on what standard to apply for determining whether an intern may be exempt from the FLSA).

[47] Weddell, supra, at 51

[48] *Eberline*, 980 F.3d at 1017 (Addressing the concerns of the defendants regarding conflicting determinations based on similar facts will make FLSA claims in vocational-learning relationships more complex).

[49] *Id.* at 1017 (explaining where the segment of work at issue provided benefits as a result of its place in the educational relationship, the courts test would consider those benefits).

[50] *Id.*

THE HONORABLE DAVID W. CHRISTEL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

Petitioner,

v.

,

Respondent.

RESPONDENT'S ANSWER AND MEMORANDUM OF AUTHORITIES

NOTE ON MOTION CALENDAR:
December 16, 2022

The Respondent, by and through his attorneys, Robert W. Ferguson, Attorney General, and John J. Samson, Assistant Attorney General, submits this answer and memorandum of authorities in response to Petitioner's habeas corpus petition.[1]

I. STATEMENT OF THE CASE

A. Statement of Facts

Petitioner is in custody under a state court judgment and sentence imposed for his conviction on one count of assault in the first degree. Exhibit 1, Judgment and Sentence, Pierce County Cause

The Washington Court of Appeals summarized the facts underlying Petitioner's conviction as follows:

[1] Unless specifically admitted in this answer, Respondent denies the factual and legal allegations set forth in the habeas corpus petition.

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On an afternoon in early September 2016, Brian Loredo, accompanied by his brother Abel, was driving his Tesla on Canyon Road in the Puyallup area, destined for north Tacoma. Also traveling on Canyon Road was the defendant, Petitioner, driving a BMW sedan, accompanied by his 15-year-old son. Both drivers entered the on-ramp to State Route (SR) 512 at the same time.

Brian would later testify that since the cars were side by side, he sped up as part of the merging process. Petitioner claimed that the Tesla "zoomed forward[,] cutting us off." Report of Proceedings (RP) [footnote omitted] at 627. It is undisputed that Petitioner responded by honking; he would later characterize his honking as "let[ting] them know I was there. Cautionary." *Id.*

Brian and the Petitioner agree that middle fingers were raised, although Brian and the Petitioner disagree about who flipped off who, or did so first. The Loredos' and Petitioner versions about what took place in the time it took for the cars to travel on SR 512 to Interstate 5 (I-5), and then to I-5's 38th Street exit, diverge widely. While their competing versions of those events were relevant at trial, they are immaterial to the issues on appeal.

Brian slowed down to leave I-5 at the 38th Street exit and it is undisputed that as he did, Petitioner pulled in front of him and both Petitioner and Brian pulled over and stopped. Brian and Petitioner stepped out of their cars and argued. There was a short physical altercation, after which Petitioner got back into his BMW and Brian turned back toward his own car. As Brian returned to the Tesla, Abel stepped out to speak to him, and the two stood in front of the car, where Abel asked Brian if he was okay. Speaking of Petitioner Brian said something like, "Dude's tripping. ... He's crazy," and suggested that they wait for Petitioner to drive off. RP at 256.

According to Brian and Abel, as they waited for the Petitioner to leave, Petitioner revved his engine and then suddenly sped in reverse toward the two men. Brian was able to jump sideways, out of the way, but Abel, who was standing near the center of the Tesla, could only leap up in an effort to avoid being hit. Unable to leap high enough, his leg was crushed between the BMW and the front bumper of the Tesla. No sooner had Petitioner struck Abel and the Tesla than he put the BMW into forward gear and drove off.

A passing motorist, Kome Eteuati, saw the collision and Petitioner's immediate departure and decided to follow the BMW to "get some justice for the guy that ... [got] hit." RP at 122. He honked his horn in an effort to get the BMW to stop. When that did not work, he used his cell phone to take pictures and a short video of the fleeing BMW and its license plate. He returned to the scene of the collision, where Abel had used Brian's belt as a tourniquet to stop the bleeding and 911 had been called. Abel was taken to the hospital where his leg was amputated below the knee.

Mr. Eteuati's video was relied on by the Washington State Patrol to publicize its search for the BMW and its driver. Four days after the accident, Petitioner contacted police. He was charged with first degree assault and failure to remain at the scene of an accident involving an injury.

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At Petitioner's jury trial, the first three witnesses called by the State were Mr. Eteuati and two other individuals who had been traveling in the vicinity of the BMW and the Tesla for 10 or 15 minutes leading up to the collision. Their testimony was largely damaging to the defense.

During a break following most of Mr. Eteuati's direct testimony, the State moved to prevent cross-examination about a statement Mr. Eteuati volunteered during a telephonic interview with a detective. Referring to a transcript of the taped interview, the prosecutor explained:

> [Mr. Eteuati] volunteered ... that "I honestly believe, sir, his intention was to hit the vehicle and drive off. But didn't realize the guy was between both cars, you know. It might have been an accident, but it was still like wrong, man."
>
> The detective responded with, "Right. So you believe his intention was to hit the car?"
>
> [Mr. Eteuati's] Answer: "Correct. Yes, I don't think his intention was to crush the guy, you know."

RP at 131-32.

The prosecutor told the court that later in the detective's interview of Mr. Eteuati, the detective asked, "Could you see if the driver of the first car, the BMW, was looking when he backed up at all or could you tell?" and Mr. Eteuati's answer as recorded in the transcript is "Honestly, I don't—I don't think I was. I mean, honestly, sir, I don't think he ...." RP at 132. The prosecutor told the court that when interviewed by the defense, Mr. Eteuati indicated he did not see Petitioner look back while driving in reverse but Petitioner could have been looking in one of his mirrors. Summarizing, the prosecutor said, "I believe that the witness doesn't know. In other words, conceivably it could have been happening, but he doesn't know." *Id.*

The prosecutor told the court that when she asked Mr. Eteuati for the basis of his belief that Petitioner did not intend to hit Abel, "[H]e didn't see anything." RP at 133. She said she was clear with Mr. Eteuati that she needed to know if his statement was "based upon something you saw and observed," but "he has no idea. He simply has no idea." *Id.* The prosecutor posited that Mr. Eteuati's belief could come "frankly from his desire or wish that that would be the case." RP at 132.

When defense counsel responded, she did not dispute the prosecutor's characterization of Mr. Eteuati's statements when interviewed. She argued, however, that Mr. Eteuati's statements "go[ ] to his state of mind," and since he made "fairly clear statements" about what he "honestly believ[ed]" "that's monumental to the issues in this case and Mr. Petitioner's defense and his right to a fair trial." RP at 134.

The trial court granted the motion to exclude Mr. Eteuati's statements about Petitioner's intent, explaining, "Not only does he lack any personal

knowledge that could inform him of that, I also think that would be an improper comment on the defendant's guilt and it invades the province of the jury." RP at 135. The court told the parties it would allow the defense to inquire whether Mr. Eteuati knew if Petitioner looked in his mirror or saw anything behind the BMW.

When Brian Loredo later testified, the State touched on the defense theory that Petitioner put his BMW in reverse accidentally, asking the following questions and getting the following responses:

> [Prosecutor:] Was there anything about the way or the manner in which the car backed up that gave you any concern for it being out of control or inadvertent or—
>
> [Brian:] Well, it just kept going.
>
> [Prosecutor:] What do you mean?
>
> [Brian:] Um, well, you know, if you—I guess if somebody—to me there was no question as far as the intent.
>
> [Prosecutor]: Why do you say that?
>
> [Defense Counsel]: I'm going to object, Your Honor. It's a statement on the ultimate issue.
>
> [Prosecutor]: Asking for his opinion based upon what he observed.
>
> THE COURT: I'm going to overrule the objection. You can answer.
>
> [Prosecutor:] Based upon what you observed, why do you think that?
>
> [Brian:] Because, you know, the car if you—let's say somebody accidentally puts a car reverse, you know, when you step on the gas, once you realize—I've done it before. I've done it. In my car it's weird because the way the handle is, it's not a shifter. I've done it several times in my car. As soon as I've done that, I know to stop. But it just seemed that there was no intent to stop. It just kept going and kept going and kept going until it hit my car.

RP at 266-67.

Petitioner's teenaged son was called as the last witness in the State's case and provided testimony largely supportive of his father. In the defense case, Petitioner testified on his own behalf. The defense conceded that Petitioner was guilty of failure to remain at an accident but vigorously denied that he intentionally put his car in reverse or intended to hit Abel.

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> The jury found Petitioner guilty of first degree assault and failure to remain at the scene of an accident. [court's footnote. It also found him guilty of the lesser included charge of second degree assault, which the court dismissed.] The court imposed a total sentence of 136 months, the high end of the standard range for the assault count. . . .

Exhibit 2, Opinion, Court of Appeals Cause No.

B. State Court Procedural History

Petitioner appealed from the judgment and sentence to the Washington Court of Appeals. Exhibit 3, Brief of Appellant, Court of Appeals Cause No. 51434-6-II; Exhibit 4, Brief of Respondent, Court of Appeals Cause No. 51434-6-II; Exhibit 5, Statement of Additional Grounds for Review, Court of Appeals Cause No. 51434-6-II. After transferring the appeal from Division 2 to Division 3, the Washington Court of Appeals affirmed the judgment and sentence. Exhibit 2. Petitioner then sought review by the Washington Supreme Court. Exhibit 6, Motion for Discretionary Review, Supreme Court Cause No. 97937-5. The Washington Supreme Court denied review on April 1, 2020. Exhibit 7, Order, Supreme Court Cause No. 97937-5. The Washington Court of Appeals issued the mandate on July 15, 2020. Exhibit 8, Mandate, Court of Appeals Cause No. 36645-6-III. The Supreme Court denied Petitioner's petition for a writ of certiorari on October 13, 2020. *Petitioner v. Washington*, 141 S. Ct. 567 (2020).

On July 16, 2021, Petitioner mailed a post-conviction motion to the superior court, challenging the judgment and sentence, which the court received on July 26, 2021. Exhibit 9, Motion to Correct Judgment and Sentence, Pierce County Cause No. 16-1-03685-8. The superior court transferred the post-conviction motion to the Washington Court of Appeals for consideration as a personal restraint petition. Exhibit 10, Order on Defendant's Motion to Correct Judgment and Sentence, Superior Court Cause No. 16-1-03685-8; *see also* Exhibit 11, Response to Personal Restraint Petition, Court of Appeals Cause No. 56184-1-II. Exhibit 12, Reply to State's Response to PRP, Court of Appeals Cause No. 56184-1-II. The Washington Court of Appeals dismissed the personal restraint petition. Exhibit 13, Order Dismissing Petition, Court of Appeals Cause No. 56184-1-II.

Petitioner filed a motion for reconsideration, which the state courts treated as a motion seeking discretionary review by the Washington Supreme Court. Exhibit 14, Motion to Reconsider, Supreme Court Cause No. 100837-6; *see also* Exhibit 15, Motion for Discretionary Review, Supreme Court 100837-6. The Deputy Commissioner of the Washington Supreme Court denied review. Exhibit 16, Ruling Denying Review, Supreme Court Cause No. 100837-6. Petitioner moved to modify the ruling denying review. Exhibit 17, Motion to Modify, Supreme Court Cause No. 100837-6; *see also* Exhibit 18, Motion to Take Judicial Notice, Supreme Court Cause No. 100837-6. The Washington Supreme Court granted the motion to take judicial notice, but denied the motion to modify. Exhibit 19, Order, Supreme Court Cause No. 100837-6. The state court issued the certificate of finality on July 19, 2022. Exhibit 20, Certificate of Finality, Court of Appeals Cause No. 56184-1-II.

II. ISSUES

Petitioner's petition presents the Court with the following two grounds for habeas corpus relief:

1. Where the State failed to prove Assault I beyond a reasonable doubt, petitioner is actually innocent of the crime.

2. The charging inform[ation] is fatally defective, where it omits any victim identifiers, for a crime against a person.

ECF No. 7, at 5-7.

III. EXHAUSTION AND TIMELINESS OF PETITION

Petitioner properly exhausted his state court remedies by fairly presenting the two claims to the Washington Supreme Court as federal claims.

Petitioner timely filed the habeas petition under the federal statute of limitations because, not counting the days the personal restraint petition remained pending in the state courts, Petitioner filed the federal petition within one year after the judgment and sentence became final upon conclusion of direct review.

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IV. EVIDENTIARY HEARING

A petitioner who fails to develop the factual basis of a claim in state court is not entitled to an evidentiary hearing unless the claim relies on:

> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence;
> and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. . . .

28 U.S.C. § 2254(e)(2).

"[T]he statute applies only to prisoners who have 'failed to develop the factual basis of a claim in State court proceedings.'" *Williams v. Taylor*, 529 U.S. 420, 430 (2000). "[A] failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Id*. at 432. An attorney's failure to develop the facts in the state courts is chargeable to the petitioner. *Holland v. Jackson*, 542 U.S. 649, 653 (2004). The focus of the statute "is not on 'preserving the opportunity' for hearings . . . but rather on *limiting* the discretion of federal district courts in holding hearings." *Cullen v. Pinholster,* 563 U.S. 170, 185 n.8 (2011) (emphasis in original).

In *Shinn v. Ramirez,* 142 S. Ct. 1718 (2022), the Supreme Court rejected the argument that the lack or ineffectiveness of post-conviction counsel allows for expansion of the record without having to satisfy 28 U.S.C. § 2254(e)(2). The Supreme Court clarified that the equitable rule in *Martinez v. Ryan,* 566 U.S. 1 (2012) only excuses the procedural default of a claim, and does not avoid the requirements for an evidentiary hearing imposed by 28 U.S.C. § 2254(e)(2). *Shinn,* 142 S. Ct. at 1728. The Supreme Court first recognized the strict rules imposed by Congress and the Court that require a habeas petitioner to submit the claim, and evidence supporting the claim, to the state courts before seeking federal habeas relief. *Id*. at 1732. The Court then recognized that *Martinez* created only a very narrow exception to these strict rules.

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Shinn, 142 S. Ct. at 1733. The Court, stated, "There is an even higher bar for excusing a prisoner's failure to develop the state-court record." *Id*. The Court rejected the argument that *Martinez* avoids the requirement to satisfy 28 U.S.C. § 2254(e)(2). The Court expressly held, "a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel." *Id*. at 1734. "In sum, under § 2254(e)(2), a prisoner is 'at fault' even when state postconviction counsel is negligent. In such a case, a federal court may order an evidentiary hearing or otherwise expand the state-court record only if the prisoner can satisfy § 2254(e)(2)'s stringent requirements." *Id.* at 1735.

Moreover, even if the statute does not bar an evidentiary hearing, the decision to hold a hearing is still committed to the Court's discretion. *Schriro v. Landrigan*, 550 U.S. 465, 473-75 (2007). The Court should not grant an evidentiary hearing if the petitioner cannot obtain habeas relief under the standards imposed by 28 U.S.C. § 2254(d). *Landrigan*, 550 U.S. at 473-75. Because the petitioner seeking relief must satisfy the standards imposed by 28 U.S.C. § 2254(d), the Court must consider those standards when deciding whether an evidentiary hearing is appropriate in a particular case. *Id*. The statute specifically limits the Court's factual scope of review "to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). The "backward-looking language" of the statute requires "that the record under review is limited to the record in existence at that same time *i.e.,* the record before the state court." *Id*. at 182. "[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review." *Id*. at 185. Finally, the petitioner must produce competent evidence demonstrating the existence of a genuine question of material fact that requires an evidentiary hearing. *Morris v. State of California*, 966 F.2d 448, 454-55 (9th Cir. 1991).

Petitioner does not satisfy the above standards for obtaining an evidentiary hearing. The Court should resolve the petition on the existing state court record, without granting an evidentiary hearing.

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V. ARGUMENT

A. To Obtain Relief, Petitioner Must Prove the State Court Adjudication of the Claims was Contrary to or an Unreasonable Application of Clearly Established Federal Law, or Rested upon an Unreasonable Determination of the Facts, in Light of The Evidence Presented to the State Court

1. 28 U.S.C. § 2254(d) Imposes a Highly Deferential Standard for Reviewing the State Court Adjudication

28 U.S.C. § 2254(d) limits the power of the Court to grant relief to a prisoner confined under a state court judgment and sentence. *Williams v. Taylor*, 529 U.S. 362, 399 (2000). The Court may no longer grant the writ simply because the Court concludes in its independent judgment that a constitutional error has occurred. *Id*. at 411. Instead, the statute circumscribes the Court's review of claims decided in state court by creating "an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings." *Uttecht v. Brown*, 551 U.S. 1, 10 (2007). This means the petitioner must now do more than simply prove that a constitutional error had occurred, or that the state court erred in analyzing the claim. *Bell v. Cone*, 535 U.S. 685, 698-99 (2002). It is not enough even if the Court finds the state court conclusion was clearly erroneous. *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). Rather, the Court may grant habeas corpus relief "on a claim 'adjudicated on the merits' in state court only if the decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Waddington v. Sarausad*, 555 U.S. 179, 190 (2009) (quoting 28 U.S.C. § 2254(d)(1)).

Under this standard, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). The petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*. at 103. In other words, the petitioner bears the burden of showing "there was no reasonable basis for the state court to deny relief." *Id*. at 98.

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"If this standard is difficult to meet, that is because it was meant to be." *Harrington*, 562 U.S. at 102. While the statute "stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings," the statute does impose a modified res judicata rule that constrains the federal court's authority to substitute its judgment for that of a state court on the correct resolution of the claim of constitutional error. *Id*. The statute "demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). Readiness to find reversible constitutional error is inconsistent with this deferential standard. *Id.*; *see also Brown v. Payton*, 544 U.S. 133, 141-47 (2005); *Bell v. Cone*, 543 U.S. 447, 455 (2005).

The "contrary to" clause of 28 U.S.C. § 2254(d)(1) allows relief only if the "state court arrives at a conclusion opposite to that reached by this Court on a question of law," or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours." *Williams*, 529 U.S. at 405. To be "contrary to" clearly established federal law, the state court decision "must be substantially different from the relevant precedent of this Court." *Williams*, 529 U.S. at 405. Where the challenge is to the manner in which the state court applied federal law, the case does not fall within the "contrary to" clause. *Id*. at 407. The "unreasonable application" clause of 28 U.S.C. § 2254(d) imposes a substantially high burden to obtain relief. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). The pivotal question under the statute focuses not on the existence of an alleged constitutional error, but on the reasonableness of the state court's resolution of the claim of error. *Harrington*, 562 U.S. at 101. Whether the state court decision was unreasonable depends in great part upon the specificity of the rule at issue because "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

The statutory phrase "clearly established federal law" limits the federal court's review "to the holdings, as opposed to the dicta" of the existing Supreme Court's decisions. *Williams*, 529 U.S. at 412. The holding is limited to the final result of the case as well as the portions of

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the opinion necessary to that result. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). A sentence is dicta if it was not essential to the disposition of the contested issues. *Central Green Co. v. United States*, 531 U.S. 425, 431 (2001). An expression by the Court that goes beyond the point actually decided is not a holding. *Humphrey's Executor v. United States*, 295 U.S. 602, 626-27 (1935). "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001). Implications that purportedly follow from a holding of the Supreme Court are insufficient to create clearly established federal law for purposes of 28 U.S.C. § 2254(d). *Glebe v. Frost*, 574 U.S. 21, 23-25 (2014); *Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005); *Thaler v. Haynes*, 559 U.S. 43, 47-49 (2010); *Berghuis v. Smith,* 559 U.S. 314, 329-33 (2010); *Renico v. Lett*, 559 U.S. 766, 773-79 (2010); *Mickens v. Taylor*, 535 U.S. 162, 174-76 (2002).

A highly generalized principle derived from isolated sentences of this Court's opinions does not constitute clearly established federal law. *Lopez v. Smith*, 574 U.S. 1, 6 (2014) ("We have before cautioned the lower courts . . . against 'framing our precedents at such a high level of generality.'" (quoting *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam)). While "the lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law," *see Marshall v. Rodgers*, 569 U.S. 58, 62 (2013), if the Supreme Court has not addressed the particular issue in a holding, the rule is not clearly established, and the state court adjudication cannot be contrary to or an unreasonable application of clearly established federal law. *Carey v. Musladin*, 549 U.S. 70 (2006). Similarly, "'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" *White v. Woodall*, 572 U.S. 415, 426 (2014) (quoting *Yarborough*, 541 U.S. at 666). "AEDPA's carefully constructed framework 'would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law.'" *White,* 572 U.S. at 426 (quoting *Yarborough*, 541 U.S. at 666).

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The Court may grant relief if the state court adjudication "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). However, to constitute an unreasonable determination of the facts, the evidence must be "too powerful to conclude anything but" the contrary of that reached by the state court. *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005); *Rice v. Collins*, 546 U.S. 333, 341-42 (2006). A factual determination is not unreasonable simply because the court did not conduct an evidentiary hearing. *Hurles v. Ryan*, 752 F.3d 768, 778 (9th Cir. 2014); *Sully v. Ayers*, 725 F.3d 1057, 1075-76 (9th Cir. 2013); *Boyer v. Chappell*, 793 F.3d 1092, 1099 n. 5 (9th Cir. 2015). The Ninth Circuit has "never held that a state court must conduct an evidentiary hearing to resolve every disputed factual question; such a per se rule would be counter not only to the deference owed to state courts under AEDPA, but to Supreme Court precedent." *Hibbler v. Benedetti*, 693 F.3d 1140, 1147 (9th Cir. 2012).

2. *Teague* Non-Retroactivity Doctrine

Similar to 28 U.S.C. § 2254(d), the *Teague* non-retroactivity doctrine generally bars a grant of relief based upon a new rule of criminal procedure. *Teague v. Lane*, 489 U.S. 288 (1989). A "new rule" is one that "breaks new ground," "imposes a new obligation on the States or the Federal Government," or "was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (emphasis in original); *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993); *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994); *Graham v. Collins*, 506 U.S. 461, 468 (1993). Viewing the precedent existing at the time the state court judgment became final, the Court must determine whether the rule asserted by a claim is either a "new rule," or an "old rule." *Caspari*, 510 U.S. at 390. Unless reasonable jurists at the time would have felt compelled by existing precedent to grant relief, the non-retroactivity doctrine precludes the Court from granting relief. *Goeke v. Branch*, 514 U.S. 115 (1995). The application of an old rule in a new setting or in a manner not dictated by precedent constitutes a new rule. *Stringer v. Black*, 503 U.S. 222, 228 (1992).

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B. Under the "Doubly Deferential" Standard of 28 U.S.C. § 2254(d), the State Court Reasonably Determined the Prosecution Presented Sufficient Evidence to Prove Guilt Beyond a Reasonable Doubt (Claim 1)

Where the petitioner alleges a claim of insufficient evidence, "the relevant question is whether . . . *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). A petitioner may obtain relief only "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id*. at 324. The Court must "view the record as a whole in the light most favorable to the prosecution." *Gordon v. Duran*, 895 F.2d 610, 612 (9th Cir. 1990). The Court's review of the record for sufficiency of the evidence is sharply limited, and the Court necessarily owes great deference to the trier of fact. *Wright v. West*, 505 U.S. 277, 296-97 (1992).

"[T]he prosecution need not affirmatively 'rule out every hypothesis except that of guilt....'" *West*, 505 U.S. at 296 (quoting *Jackson*, 443 U.S. at 326). Rather, "a reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume–even if it does not affirmatively appear in the record–that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *West,* 505 U.S. at 296-97 (quoting *Jackson*, 443 U.S. at 326). Moreover, the Court must judge the sufficiency of evidence against the statutory elements of the crime as determined by the state courts, not against any additional "elements" that might be erroneously included in the jury instructions. *Musacchio v. United States*, 577 U.S. 237, 243 (2016). As the Supreme Court held, "when a jury instruction sets forth all the elements of the charged crime but incorrectly adds one more element, a sufficiency challenge should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction." *Id*. In other words, review of the sufficiency of the evidence "does not rest on how the jury was instructed." *Musacchio*, 577 U.S. at 243. "When a jury finds guilt after being instructed on all elements of the charged crime plus one more element, the jury has made all the findings that due process requires." *Id*.

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Although the petitioner may assert actual innocence of the crime, such claims do not state ground for federal habeas relief absent the existence of a constitutional error. *Herrera v. Collins*, 506 U.S. 390, 400 (1993). Federal habeas review is limited to claims of constitutional violations occurring in the course of the underlying state criminal proceeding. *Id*. at 416-17. The alleged existence of evidence demonstrating the petitioner's innocence is not a ground for relief. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); *Swan v. Peterson*, 6 F.3d 1373 (9th Cir. 1993). Granting relief on a claim of actual innocence would require the Court to announce and apply a new rule of criminal procedure in violation of *Teague v. Lane,* 489 U.S. 288 (1989).

In addition to the deference owed to the trier of fact under *Jackson v. Virginia*, the habeas statute, 28 U.S.C. § 2254(d), also requires that the Court provide a high level of deference to the state court's adjudication of the claim. *Coleman v. Johnson,* 566 U.S. 650, 651 (2012) ("We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference."); *Cavazos v. Smith*, 565 U.S. 1, 7 (2011) (recognizing the doubly deferential standard). The statute imposes a "twice-deferential standard" of review. *Parker v. Matthews*, 567 U.S. 37, 43 (2012). "An additional layer of deference is added to this standard of review by 28 U.S.C. § 2254(d), which obliges the petitioner . . . to demonstrate that the state court's adjudication entailed an unreasonable application of the *Jackson* standard." *Emery v. Clark*, 604 F.3d 1102, 1111 n. 7 (9th Cir. 2010) (citing *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005)). Thus, this Court's review of the state court decision must be "doubly deferential." To obtain relief on a claim of insufficient evidence, the petitioner must prove both that the evidence viewed in the light most favorable to the prosecution was insufficient to support the jury's verdict, and that the state court's decision on the claim was objectively unreasonable.

In this case, the Washington Supreme Court reasonably rejected the claim of insufficient evidence and denied Petitioner's claim. Petitioner fails to satisfy the "doubly deferential" burden imposed under *Jackson v. Virginia* and 28 U.S.C. § 2254(d). Consequently, Petitioner does not show a basis for habeas corpus relief.

Petitioner alleges that the prosecution presented insufficient evidence to support a conviction for assault in the first degree, and that he is actually innocent of that crime, because the jury having also convicted Petitioner of the lesser-included offense of assault in the second degree must have determined he did not commit assault in the first degree. However, in harmony with *Musacchio v. United States*, 577 U.S. 237, 243 (2016), the Washington Supreme Court reasonably rejected this claim. The state court reasonably determined that the verdict of guilty on both charged crimes, despite the wording of the information charging the crimes, did not eliminate the evidence proving beyond a reasonable doubt that Petitioner committed the elements of the crime of assault in the first degree. Exhibit 16, at 2-3. The court held:

> His main argument is predicated on the fact that the State charged him with first and second degree assault on the basis of the same act and alleged in the charging document that the second degree assault was committed "under circumstances not amounting to assault in the first degree." *See* RCW 9A.36.021(1). Petitioner appears to argue that, since the jury found him guilty of second degree assault, it necessarily found that he committed the assaultive act "under circumstances not amounting to assault in the first degree." He therefore urges he is actually innocent of first degree assault. But the quoted language, while taken from the second degree assault statute, is not an element of that offense but only serves to explain the distinctions between second degree assault and first degree assault. *State v. Keend*, 140 Wn. App. 858, 872, 166 P.3d 1268 (2007). As part of the charging document, therefore, this language was surplusage. That phrase was *not* included in the to-convict instruction or in the instruction defining second degree assault, and thus the jury was not required to find that Petitioner's conduct did not amount to first degree assault. Rather, the jury was instructed only that to find Mr. Petitioner guilty of second degree assault, it had to find that he intentionally assaulted the victim and thereby recklessly inflicted substantial bodily harm or assaulted the victim with a deadly weapon. Finding Petitioner guilty of that crime as instructed did not have the effect of finding he did not commit first degree assault, since the jury still could have found that he committed first degree assault as well, the main distinguishing features of which are assaulting another with intent to inflict great bodily harm and actually inflicting such harm or assaulting another with a deadly weapon or other force likely to produce great bodily harm.

Exhibit 16, at 2-3.

Petitioner does not show the state court adjudication was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. On the contrary, the decision is consistent with the Supreme Court's decision in *Musacchio*. Consequently, 28 U.S.C. § 2254(d) bars relief.

Applicant Details

First Name	**Neal**
Middle Initial	**J**
Last Name	**Brubaker**
Citizenship Status	**U. S. Citizen**
Email Address	**neal.brubaker@gmail.com**
Address	**Address** Street **1717 Wilmoore Dr. SE** City **Albuquerque** State/Territory **New Mexico** Zip **87106** Country **United States**
Contact Phone Number	**6209510580**

Applicant Education

BA/BS From	**Goshen College**
Date of BA/BS	**May 2015**
JD/LLB From	**University of Arizona James E. Rogers College of Law** **http://www.law.arizona.edu/**
Date of JD/LLB	**May 15, 2022**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**Arizona Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Fegtly Moot Court Competition (Univ. of Arizona - Rogers College of Law)** **ABA National Appellate Advocacy Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Cunningham, Edie
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Simon, Diana
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References

Hon. Michelle Castillo Dowler,
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-
Hon. Eric J. Markovich,
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Neal J. Brubaker

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June 27, 2023

The Honorable James O. Browning
United States District Court
Pete V. Domenici U.S. Courthouse
333 Lomas Blvd. NW, Albuquerque, NM 87102

Dear Judge Browning:

I am currently a trial attorney at the Law Offices of the New Mexico Public Defender writing to apply for a judicial clerkship in your chambers at the U.S. District Court in Albuquerque.

My intent since entering law school has been to work in public interest law. So far in my brief career, I've managed to accomplish that. During law school, I strived for practical breadth, working in both criminal and civil law with the Federal Defender and Civil Division of the County Attorney's Office. I added to this knowledge as a judicial extern for the Honorable Eric Markovich, a Magistrate Judge at the U.S. District Court for the District of Arizona. There, along with drafting orders and legal research, I received an inside view of what a judicial clerk does every day, how a judge reasons through challenging issues, and the critical duty of the court to ensure that rights are protected and all parties are treated fairly.

Law school inspired a passion for trial work and litigation. I pursued this passion and found my way to Albuquerque, where I litigate on behalf of clients as a public defender. While I've enjoyed learning about criminal law at the state level, the opportunity to clerk on a trial court at the Federal level would be incredible. The experience as a law clerk would be exceptionally valuable for someone looking to gain trial experience on all levels. The prospect of diving into complex constitutional, procedural, and evidentiary issues, and viewing them from a judge's lens is truly exciting.

While I recognize the value of the position, I'm also pleased at the idea of continuing to live and work in Albuquerque. Though I came from small-town Kansas, my wife and I have found ourselves at home in this beautiful, Southwest city. I would gladly accept the opportunity to deepen relationships, expand professionally, and continue living in a vibrant city with countless chances for outdoor exploration.

Thank you for your consideration. I hope that my experience, skills, and passion for trial practice prove to be beneficial to the important work of the court.

Respectfully,

Neal Brubaker

Neal J. Brubaker

(620) 951-0580 • neal.brubaker@gmail.com • Albuquerque, New Mexico 87106

EDUCATION

University of Arizona James E. Rogers College of Law, Tucson, AZ
Juris Doctor, May 2022, *summa cum laude*, GPA: 3.92, Class Rank: 6/150

- Journal: *Arizona Law Review* (Note Editor)
- Moot Court: ABA Appellate Advocacy Moot Court Team (Quarterfinalist & Award for Top-5 Brief); Fegtly Moot Court Competition (Quarterfinalist)
- Honors and Awards: Order of the Coif; James J. & Rose S. Silver Scholarship; CALI awards for Advanced Legal Writing, Torts, Legal Research, Analysis & Communication I, and Professional Responsibility
- Activities: Barry Davis Mock Trial Team; Teaching Assistant for Legal Writing; Workers' Rights Clinic; Community Immigration Law Clinic; Keep Tucson Together Pro-Bono Volunteer; Member of Justice Advocates Coalition

Goshen College, Goshen, IN
Bachelor of Arts, Business, May 2015, GPA: 3.87/4.0

LEGAL EXPERIENCE

New Mexico Law Offices of the Public Defender, Albuquerque, NM
Trial Attorney, August 2022 – Present
Currently representing indigent clients for variety of criminal matters in Bernalillo Metropolitan Court; litigated several bench trials, argued numerous motions, and handled daily pre- and post-disposition hearings; organized and managed heavy misdemeanor caseload

Pima County Attorney's Office, Civil Division, Tucson, AZ
Summer Law Clerk, May 2021 – May 2022
Conducted legal research and wrote memoranda for Deputy County Attorneys on civil issues spanning from state constitutional matters, property disputes, and § 1983 litigation; drafted advisory memoranda for the County Board of Supervisors on new state law amendments and conditional ordinances; assisted in drafting new legislation proposing the elimination of cash bail in Arizona

The Hon. Eric J. Markovich, U.S. District Court for the District of Arizona, Tucson, AZ
Judicial Extern, January 2021 – May 2021
Drafted judicial orders and memoranda on issues including habeas corpus, a motion to quash a subpoena, competency to stand trial, and payment of attorney's fees; discussed and analyzed research and legal conclusions with law clerk and judge

Federal Public Defender – District of Arizona, Tucson, AZ
Summer Law Clerk, June 2020 – August 2020
Drafted motions and briefs and completed research for attorneys on a variety of cases and issues including due process confrontation rights in preliminary hearings, compassionate release, discovery disputes, competency, and pre-trial equal protection standards

BAR ADMISSIONS

State of New Mexico, October 2022

SKILLS & INTERESTS

- Languages: Conversational/intermediate Spanish ability
- Interests: Playing bluegrass music on guitar, eating local foods during travel (including a recent trip to Spain and Morocco), currently learning to play soccer

Name: **Neal J Brubaker**
Student ID: **23504660**
Birthdate: **10/09/1992**

Page 1 of 2
Print Date: 01/12/2023
Unofficial Transcript

Institution Info: The University of Arizona

Degrees Awarded

Degree: **Juris Doctor**
Confer Date: 05/13/2022
Degree GPA: 3.917
Degree Honors: Summa Cum Laude
Plan: Major in Law

Beginning of Law Record

Academic Program History

Program: James E. Rogers College of Law
04/30/2018 Active in Program
Major in Law

Fall 2019

Course	Description	AHRS	EHRS	Grade	Points
LAW 600A	Contracts	4.000	4.000	A-	14.668
LAW 601A	Civil Procedure	4.000	4.000	A	16.000
LAW 603A	Legal Resrch, Analysis & Com I	3.000	3.000	A	12.000
LAW 604C	Torts	4.000	4.000	A	16.000
LAW 679B	Preparing to Practice	1.000	1.000	P	0.000

		AHRS	EHRS	QHRS	Points
Term GPA:	3.911	16.000	16.000	15.000	58.668
Transfer Term GPA		0.000	0.000	0.000	0.000
Combined GPA	3.911	16.000	16.000	15.000	58.668

		AHRS	EHRS	QHRS	Points
Cum GPA:	3.911	16.000	16.000	15.000	58.668
Transfer Cum GPA		0.000	0.000	0.000	0.000
Combined Cum GPA	3.911	16.000	16.000	15.000	58.668

Term Honor: College of Law Dean's List

Spring 2020

Temporary and revised grading policies in place. P grade in Special Pass/Fail satisfies program requirements.

Course	Description	AHRS	EHRS	Grade	Points
LAW 602	Criminal Procedure	3.000	3.000	P	0.000
Grading Basis:	Special Spring 2020 Pass/Fail				
LAW 603B	Legal Rsrch, Analysis & Com II	2.000	2.000	P	0.000
Grading Basis:	Special Spring 2020 Pass/Fail				
LAW 605	Property	4.000	4.000	P	0.000
Grading Basis:	Special Spring 2020 Pass/Fail				
LAW 606	Constitutional Law I	3.000	3.000	P	0.000
Grading Basis:	Special Spring 2020 Pass/Fail				
LAW 620	Immigration Law	3.000	3.000	P	0.000
Grading Basis:	Special Spring 2020 Pass/Fail				

		AHRS	EHRS	QHRS	Points
Term GPA:	0.000	15.000	15.000	0.000	0.000
Transfer Term GPA		0.000	0.000	0.000	0.000
Combined GPA	0.000	15.000	15.000	0.000	0.000

		AHRS	EHRS	QHRS	Points
Cum GPA:	3.911	31.000	31.000	15.000	58.668
Transfer Cum GPA		0.000	0.000	0.000	0.000
Combined Cum GPA	3.911	31.000	31.000	15.000	58.668

Summer 2020

Course	Description	AHRS	EHRS	Grade	Points
LAW 608	Evidence	3.000	3.000	A	12.000

		AHRS	EHRS	QHRS	Points
Term GPA:	4.000	3.000	3.000	3.000	12.000
Transfer Term GPA		0.000	0.000	0.000	0.000
Combined GPA	4.000	3.000	3.000	3.000	12.000

		AHRS	EHRS	QHRS	Points
Cum GPA:	3.926	34.000	34.000	18.000	70.668
Transfer Cum GPA		0.000	0.000	0.000	0.000
Combined Cum GPA	3.926	34.000	34.000	18.000	70.668

Name: Neal J Brubaker
Student ID: 23504660
Birthdate: 10/09/1992

Print Date: 01/12/2023
Unofficial Transcript

Fall 2020

Course	Description	AHRS	EHRS	Grade	Points
LAW 609	Professional Responsibility	3.000	3.000	A	12.000
LAW 621A	Administrative Law	3.000	3.000	A-	11.001
LAW 622	Law Review	2.000	2.000	P	0.000
LAW 645C	Trial Competition	2.000	2.000	P	0.000
LAW 653D	Writing Fellows	3.000	3.000	A	12.000
LAW 674	Clinical Practice	4.000	4.000	P	0.000

		AHRS	EHRS	QHRS	Points
Term GPA:	3.889	17.000	17.000	9.000	35.001
Transfer Term GPA		0.000	0.000	0.000	0.000
Combined GPA	3.889	17.000	17.000	9.000	35.001

		AHRS	EHRS	QHRS	Points
Cum GPA:	3.914	51.000	51.000	27.000	105.669
Transfer Cum GPA		0.000	0.000	0.000	0.000
Combined Cum GPA	3.914	51.000	51.000	27.000	105.669

Spring 2021

Course	Description	AHRS	EHRS	Grade	Points
LAW 622	Law Review	1.000	1.000	P	0.000
LAW 653A	Advanced Legal Writing	3.000	3.000	A	12.000
LAW 653B	2L Fegtly Moot Court Comp.	1.000	1.000	P	0.000
LAW 653D	Writing Fellows	3.000	3.000	A	12.000
LAW 660	Remedies	3.000	3.000	A	12.000
LAW 693	Externship	2.000	2.000	P	0.000
LAW 699	Independent Study	1.000	1.000	P	0.000

		AHRS	EHRS	QHRS	Points
Term GPA:	4.000	14.000	14.000	9.000	36.000
Transfer Term GPA		0.000	0.000	0.000	0.000
Combined GPA	4.000	14.000	14.000	9.000	36.000

		AHRS	EHRS	QHRS	Points
Cum GPA:	3.935	65.000	65.000	36.000	141.669
Transfer Cum GPA		0.000	0.000	0.000	0.000
Combined Cum GPA	3.935	65.000	65.000	36.000	141.669

Fall 2021

Course	Description	AHRS	EHRS	Grade	Points
LAW 622	Law Review	2.000	2.000	P	0.000
LAW 645C	Trial Competition	2.000	2.000	P	0.000
LAW 650	Criminal Law	3.000	3.000	A-	11.001
LAW 661A	Moot Court National Team	1.000	1.000	P	0.000
LAW 674	Clinical Practice	4.000	4.000	A	16.000
Course Topic:	Workers' Rights Clinic				
LAW 675	Adv Criminal Procedure	3.000	3.000	A	12.000

		AHRS	EHRS	QHRS	Points
Term GPA:	3.900	15.000	15.000	10.000	39.001
Transfer Term GPA		0.000	0.000	0.000	0.000
Combined GPA	3.900	15.000	15.000	10.000	39.001

		AHRS	EHRS	QHRS	Points
Cum GPA:	3.928	80.000	80.000	46.000	180.670
Transfer Cum GPA		0.000	0.000	0.000	0.000
Combined Cum GPA	3.928	80.000	80.000	46.000	180.670
Term Honor:	College of Law Dean's List				

Spring 2022

Course	Description	AHRS	EHRS	Grade	Points
LAW 615B	Freedom of Speech & Expression	3.000	3.000	A-	11.001
LAW 622	Law Review	1.000	1.000	P	0.000
LAW 645B	Advanced Trial Advocacy	3.000	3.000	A	12.000
LAW 645C	Trial Competition	1.000	1.000	P	0.000
LAW 661A	Moot Court National Team	2.000	2.000	P	0.000

		AHRS	EHRS	QHRS	Points
Term GPA:	3.834	10.000	10.000	6.000	23.001
Transfer Term GPA		0.000	0.000	0.000	0.000
Combined GPA	3.834	10.000	10.000	6.000	23.001

		AHRS	EHRS	QHRS	Points
Cum GPA:	3.917	90.000	90.000	52.000	203.671
Transfer Cum GPA		0.000	0.000	0.000	0.000
Combined Cum GPA	3.917	90.000	90.000	52.000	203.671

End of Law Record

Official Transcript

Prepared for: Neal Brubaker on 05/07/2021
DID#: TWE5JMEK
Parchment Student ID: 16372008
Student SSN: 4036
Page 1 of 3

Jan Kauffman, Registrar

Name : Neal Jonathan Brubaker
ID : 710433
SSN : xxx-xx-4036

Page : 1 of 2

Course Number	Title	Grade	Hrs Att	Hrs Ern	Qual Pts	GPA
Accepted Transfer Credit : Summary						
Organization : Hesston College						
BISC110	Environmental Biology	B	4.00	4.00	12.00	
BUAC205	Financial Accounting I	A	4.00	4.00	16.00	
BUAC206	Managerial Accounting I	A	3.00	3.00	12.00	
BUAD109	Exploring Business	A	3.00	3.00	12.00	
BUCS119	Advanced Excel	A	1.00	1.00	4.00	
COMM206	Speech Communication	A	3.00	3.00	12.00	
ECON221	Princ of Macroeconomics	A	3.00	3.00	12.00	
ECON222	Prin of Microeconomics	A	3.00	3.00	12.00	
HIST251	Hist of World Civ I	A	3.00	3.00	12.00	
HUM 206	Music Appreciation	A	3.00	3.00	12.00	
HUM 240	International Tour	A	3.00	3.00	12.00	
MASC210	Elementary Statistics	A	3.00	3.00	12.00	
MUS 111	Bel Canto	A	1.00	1.00	4.00	
MUS 112	Bel Canto	A	1.00	1.00	4.00	
MUS 161	Private Voice	A	1.00	1.00	4.00	
MUS 162	Private Voice	A	1.00	1.00	4.00	
MUS 192	Private Guitar	A	1.00	1.00	4.00	
MUS 211	Bel Canto Singers	A	1.00	1.00	4.00	
MUS 212	Bel Canto Singers	A	1.00	1.00	4.00	
MUS 240	Chorale:Intrntnl Tour	A	1.00	1.00	4.00	
PHED210	Fitness Concepts	A	1.00	1.00	4.00	
PHED211	Racquetball	A	1.00	1.00	4.00	
PHSC201	General Astronomy	A	4.00	4.00	16.00	
PSY 201	Leadership Trng-RAs	A	1.00	1.00	4.00	
RELG100	Biblical Literature	A	3.00	3.00	12.00	
RELG214	Peacemaking & Justice	A	3.00	3.00	12.00	
SCS 101	First Year Seminar	A	1.00	1.00	4.00	
SPAN101	Elem Spanish I	B	4.00	4.00	12.00	
SPAN102	Elem Spanish II	B	4.00	4.00	12.00	
Organization : HUTCHINSON COMMUNITY COLLEGE						
EN 101	English Comp IA	A	0.00	3.00	0.00	
EN 102	English Comp II	A	0.00	3.00	0.00	
MA 106	College Algebra	A	0.00	3.00	0.00	
PS 100	Gen Psychology	A	0.00	3.00	0.00	
Term:			**66.00**	**78.00**	**252.00**	**3.82**
Career:			**66.00**	**78.00**	**252.00**	**3.82**
2013-2014 : Fall Semester						
BUS 306	Human Resource Mngmt	A	3.00	3.00	12.00	
BUS 316	Princ of Marketing	A-	3.00	3.00	11.10	
BUS 317	Financial Management	A	3.00	3.00	12.00	
BUS 350	International Business	A	3.00	3.00	12.00	
MUS 293	Men's Chorus	CR	1.00	1.00	0.00	
REL 317	Islam	A	3.00	3.00	12.00	
Term:			**16.00**	**16.00**	**59.10**	**3.94**
Career:			**82.00**	**94.00**	**311.10**	**3.84**
2013-2014 : Spring Semester						
INTL252	History & Culture of Peru	A	3.00	3.00	12.00	
INTL254	Intercultural Communication	A	3.00	3.00	12.00	
INTL256	Arts & Literature of Peru	A	2.00	2.00	8.00	
INTL258	Natural World of Peru	A	1.00	1.00	4.00	
SPAN103	Elementary Spanish III	A-	4.00	4.00	14.80	
Term:			**13.00**	**13.00**	**50.80**	**3.91**
Career:			**95.00**	**107.00**	**361.90**	**3.85**
2013-2014 : May Term						
BUS 140	Essential Business Skills	A	3.00	3.00	12.00	
Term:			**3.00**	**3.00**	**12.00**	**4.00**
Career:			**98.00**	**110.00**	**373.90**	**3.85**
2014-2015 : Fall Semester						
BUS 307	Career Planning	CR	1.00	1.00	0.00	
BUS 310	Business Law	A	3.00	3.00	12.00	
BUS 360	Java Junction Managmnt	A	3.00	3.00	12.00	
BUS 409	Internship in Business	CR	3.00	3.00	0.00	
BUS 410	Business Capstone	A	3.00	3.00	12.00	
Term:			**13.00**	**13.00**	**36.00**	**4.00**
Career:			**111.00**	**123.00**	**409.90**	**3.87**
2014-2015 : Spring Semester						
BUS 315	Princ of Management	A	3.00	3.00	12.00	
BUS 318	Operations Management	A	3.00	3.00	12.00	
BUS 403	Management Strategies	A-	3.00	3.00	11.10	

Official Transcript

Prepared for: Neal Brubaker on 05/07/2021
DID#: TWE5JMEK
Parchment Student ID: 16372008
Student SSN: 4036
Page 2 of 3

Jan Kauffman, Registrar

Name : Neal Jonathan Brubaker
ID : 710433
SSN : xxx-xx-4036

Page : 2 of 2

Course Number	Title	Grade	Hrs Att	Hrs Ern	Qual Pts	GPA
2014-2015 : Spring Semester						
SPAN202	Intermed Spanish II	CR	3.00	3.00	0.00	
	Term:		**12.00**	**12.00**	**35.10**	**3.90**
	Career:		**123.00**	**135.00**	**445.00**	**3.87**
2014-2015 : May Term						
BUS 336	Advertising	A-	3.00	3.00	11.10	
	Term:		**3.00**	**3.00**	**11.10**	**3.70**
	Career:		**126.00**	**138.00**	**456.10**	**3.87**

Degree Information :
(1) 'Bachelor of Arts' Date Conferred : 05/22/2015
Major(s)
Business
Honor(s)
Magna Cum Laude

*** End of Transcript ***
5/7/2021

This transcript is official when downloaded directly from the Parchment Exchange website. To verify the validity of the transcript, go to https://exchange.parchment.com/d/tracking/didtracker.htm?did=TWE5JMEK

Goshen College

Office of the Registrar
1700 S. Main St., Goshen, IN 46526
phone: 574-535-7517, fax: 574-535-7883
web: http://www.goshen.edu

I. Calendar and Credit Units

- Aug. 1994-Present/Semesters-Semester Hour Credits
- Sept. 1968-Aug. 1994/Trimesters-Semester Hour Credits
- Sept. 1921-Aug. 1968/Semesters-Semester Hour Credits
- Sept. 1894-June 1921/Quarters-Quarter Hour Credits

Each semester is 15 weeks long; the May term is 3 1/2 weeks long. Normal student load is 12-15 credit hours in one semester and 3-4 in May term. Minimum graduation requirements are 120 credit hours. Details on calendar before 1994 are available from the Office of the Registrar.

II. Accreditations

- Higher Learning Commission (previously North Central Association of Colleges and Schools) (1941)
- National Council for Accreditation of Teacher Education (1954)
- National League for Nursing (1961-2002)
- Commission on Collegiate Nursing Education (2002)
  - Goshen College - Eastern Mennonite University DNP Consortium (2019)
- Council on Social Work Education (1978)
- The education and nursing programs have full standing with their respective Indiana state agencies.

III. Courses Numbering System

Lower Level
000-090 preparatory courses (non-degree)
100-199 primarily for first-year students
200-299 primarily for sophomores
Upper Level
300-399 for juniors or seniors
400-499 primarily for seniors
500-899 open to graduate students

IV. Grading System

A. In Aug. 2006, Goshen College added pluses and minuses to the standard A, B, C, D, F grading scale.

	A 4.0	A- 3.7
B+ 3.3	B 3.0	B- 2.7
C+ 2.3	C 2.0	C- 1.7
D+ 1.3	D 1.0	
	F .0	FW .0

I - incomplete (temporary grade); final grade follows
NR - Grade not reported (temporary grade)
FW - Failure for non-attendance; factored into GPA
W - withdrawal
CR - credit; passing work of C (2.0) level or better; no effect on grade point average
NC - no credit; equivalent to C- (1.7) level or lower; no effect on grade point average
WIP - work in progress
* - course repeated
R - replaces previous grade and credits

Students may repeat a course. The initial grade is not used in computing the grade point average, however it will remain on the transcript as matter of record.

B. Summary totals and grade point average

Following each semester's course entry are summary lines showing current semester and cumulative information. For students in the years 1972-1980, the grade point average was not used internally and not posted on the transcript.

V. Distinctive Information

A. International Education - Goshen has made a particular commitment to international education. An integral program since 1968 has been the Study-Service Term (SST). All graduates participate in SST, other overseas study programs, or an on-campus alternate program of non-western and intercultural courses. SST is group study in a foreign country under direction of a Goshen College faculty member. In most countries, the student spends seven weeks in intensive study of the host nation and its language. Subsequently, six weeks are spent in a service learning experience. Students earn credit as follows (since 2003):
2003 - 2019
Language - 4 hours
Intercultural Communication - 3 hours
History and Culture of (Country) - 3 hours
Arts and Literature of (Country) - 2 hours
The Natural World of (Country) - 1 hour
2020 - Present
Language - 4 hours
Cultural Perspectives - 3 hours
Global Topics - 3 hours
Community Engaged Learning - 3 hours
Global Integration Capstone - 2 hour

B. Degree Completion Programs - In 1992 Goshen began a B.S. degree program geared to the adult student who has earned at least 60 college credits in previous study.

C. Goshen College Biblical Seminary - From 1944 to 1970 Goshen College operated a seminary which granted first-professional degrees. Goshen College transcripts to June 1970 include any seminary study. In July 1970 the seminary was separated from Goshen College and constituted as Goshen Biblical Seminary, now Anabaptist Mennonite Biblical Seminary, located at 3003 Benham Ave., Elkhart, Indiana 46517.

FEDERAL PUBLIC DEFENDER
District of Arizona
407 West Congress Street, Suite 501
Tucson, Arizona 85701

JON M. SANDS
Federal Public Defender

(520) 879-7500
(FAX) (520) 879-7600
1-800-758-7054

May 20, 2021

Re: Neal Brubaker Law Clerk Application

I am writing to recommend Neal Brubaker for the law clerk position in your chambers. He worked as a legal intern in our office from June-August 2020. My practice focuses on appellate work. Mr. Brubaker sometimes assisted me, and I also helped supervise his projects for trial attorneys.

Mr. Brubaker is an exceptional legal scholar. His projects here encompassed a variety of topics, including restitution, the right to confrontation at pretrial hearings, and the equal protection clause. His research is comprehensive and on-point, his analysis is highly perceptive, and his writing is fluid and organized.

Given his assets and interests, Mr. Brubaker is well-suited for an appellate or trial court clerkship. He is also personable and a consummate professional. If you would like any further information, please call me at (520) 879-7500.

Sincerely,

Edie Cunningham

Edie Cunningham
Assistant Federal Public Defender

THE UNIVERSITY OF ARIZONA
James E. Rogers College of Law

CHRISTOPHER L. GRIFFIN, JR.
Director of Empirical & Policy Research
James E Rogers College of Law
1201 E Speedway Blvd
PO Box 210176
Tucson AZ 85721-0176
Office: (520) 626-8265
Email: chrisgriffin@arizona.edu

law.arizona.edu

July 12, 2023

The Honorable James O. Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Re: Neal Brubaker

Dear Judge Browning:

I write in support of Neal Brubaker's application for a clerkship position with you during the next available term. I joined the University of Arizona College of Law faculty in 2018 after serving as the Research Director at Harvard Law School's Access to Justice Lab and faculty positions at William and Mary and Duke Law Schools.

Neal was a student in my Fall 2019 Civil Procedure and Spring 2021 Remedies courses and was easily one of our all-around most impressive students in the Class of 2022. In both classes, Neal distinguished himself easily and often. Considering the quality of his volunteered answers, his deft handling of Socratic dialogue, or his amiable presence, I will remember Neal for decades to come. He is easily in the top 10% of students I have taught across three great law schools in addition to finishing in the top 10 of his cohort. Combining genuine humility and an intense intellect, Neal has shown his remarkable capabilities at every turn. **He received one of my three highest recommendations for judicial clerkships in his class, and I trust that he would be an invaluable member of your chambers staff.**

Neal seemed to have mastered the art of independent studying. He rarely if ever needed to stay after class or schedule office hours for anything other than career advice, including the clerkship application process. I predict that Neal would therefore be an exemplary clerk whenever asked to complete a rigorous research assignment or to produce a draft document on an unusually tight deadline. Many students at Arizona Law and around the country could of course do the same. Neal stood out for his ability to get the job done as efficiently as possible. I *know* that he worked tremendously hard; he just made the path he cleared through law school appear effortless.

The Remedies section included about 15 other top-flight members of Neal's cohort, ranking among the most talented I have ever taught the subject. Neal once again rose near the top, both in terms of his final grade (A) and what I observed during our class meetings (nearly all of which were via Zoom). My Remedies syllabus covers all the major rules for tort and contract

damages before moving into two months of equitable relief. I could usually rely on Neal to wade into the discussion proficiently, whether the question called for a straightforward answer or a more extended analysis.

Such active engagement only builds upon the brilliance of his written product in Civil Procedure. Neal earned the second-highest overall mark in the section with a final exam that missed perfection by ten points. The most difficult question on the test asked students to evaluate whether a complaint filed in state court containing state and federal causes of action could be removed to federal district court. A solid answer demanded that students also know how to apply the rules of supplemental jurisdiction. Neal's answer was, once again, nearly perfect. He demonstrated a powerful ability to make sense of the U.S. Code procedures for removal and arrive at the correct decision. If he had that academic prowess as a first-semester J.D. student, I am sure he will marvel as a recent graduate.

My admiration for Neal extends beyond the classroom. He somehow found reservoirs of time and energy to collaborate with other campus leaders. He set a course early at Arizona Law toward advocacy in the public interest and lived out that commitment in the vaunted Justice Advocates Coalition and the Community Immigration Law Clinic. Neal also joined a handful of other Class of 2022 stars to assist with intake and bond applications for detained immigrants through Keeping Tucson Together. He managed to serve the broader Southern Arizona community while also serving other students as a Writing Fellow. Neal also flourished as a Note Editor on the *Arizona Law Review* and on the Barry Davis Mock Trial Team. He amassed the "trophies" of law school life without an iota of egocentricity, and I still appreciate that rare quality.

Finally, I offer such a strong recommendation on Neal's behalf because he personally won over the College of Law faculty and student body. Other members of our community trusted Neal and looked to him for moral as well as academic leadership. He is a young man of profound integrity to match his promise.

Neal Brubaker reached stratospheric highs during his three years in law school. He practically comes with a guarantee of continued excellence as a judicial clerk, and I hope you find the same to be true if you offer him a position. Serving in this role will be a fitting next step for his life in the law. Should you have any questions about Neal or this recommendation, please do not hesitate to be in touch.

Sincerely,

Christopher L. Griffin, Jr.

July 12, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

It is my pleasure to recommend Neal Brubaker for a judicial clerkship. I am Associate Clinical Professor of Law at the James E. Rogers College of Law at the University of Arizona. I have taught numerous classes over the years, including Advanced Legal Writing and Appellate Advocacy, Legal Analysis, Writing and Research, a Civil Procedure Practice Lab, Moot Court, a Contracts Lab, and Pretrial Litigation. I have been teaching at the law school since 1994 and have evaluated the work of nearly a thousand students during that time. I also practiced law for 25 years, so I am familiar with the inner workings of a courtroom.

I met Neal in the fall of 2019 when he was a 1L student in my legal writing class during his first semester in law school. Although that class consisted of 26 students, I got to know Neal well both professionally and personally. He received the CALI award in the class because he received the highest overall score on his final project—an office memo—and the highest research score. Further, as part of the grading rubric for the final project, there is a score for "details." This includes things like proper citation, grammar, punctuation, accurate pin cites, etc. He received the overall highest score on this part of the rubric in the entire class, demonstrating his excellent attention to detail.

In the spring of 2020, even though he was no longer my student, I asked him to apply to be my writing fellow for the fall of 2020. I knew that not only was Neal capable in the sense that he is an excellent writer, but equally important, I knew that he would be an excellent mentor to my 1L students. I also knew that he would work hard, which is important because I demand a lot from my writing fellows (it is known that I ask more of them than most of the other writing professors). Neal approached the process deliberatively and talked to my writing fellows about what is involved. I was thrilled when he agreed to apply. This is a competitive process, and we always have twice as many applicants than positions. We select applicants not only on their writing and analytical ability but on our perception of which students would be the best mentors to our first-year students. Based on the recommendation of the legal writing department (including his second-semester professor), Neal got the position and was my writing fellow during the 2020-2021 academic year.

Before delving into his stellar performance as a writing fellow this past academic year, I want you to be aware of his willingness to go above and beyond. In the summer of 2020, when we realized we were going to have to teach online, I asked Neal if he would be willing to volunteer to help me vet some online legal writing platforms, such as a peer review platform. Because of the pandemic, the law school had no money to reimburse students for this assistance, so it was strictly on a volunteer basis (later, the law school allowed Neal to count those hours toward his fall semester's credit). Neal worked many hours over the semester helping me and giving me thoughtful and constructive feedback on the teaching tools and assessments. He was completely responsive, even though he had a summer position at the time.

Further, as a writing fellow over a full academic year, he was top notch. During an academic year when we were entirely online, he persevered, never letting Covid-19 and the attendant ramifications of that interfere in his ability to be professional and responsive. He took a genuine interest in "his" students (each writing fellow is assigned a team of about 10-12 students), and I received feedback that he is an excellent mentor. In addition to the excellent attention to detail I saw in his own work as my student, he showed keen attention to detail in reviewing the work of others. I have my writing fellows review all their assigned memos and briefs and mark every single mistake as far as case citation, pinpoint citations, capitalization, quotation errors, etc. I review the papers for the same errors, and Neal always found errors that I missed.

I know that Neal has a strong desire for a clerkship. First, he believes that clerking provides the best opportunity for learning after law school. Second, clerking will provide him with an excellent mentor who can help him further improve his already well-developed research and writing skills. Finally, he understands the profound impact courts can have on our system of justice and wants to have the opportunity to play a role in that system. He has my highest recommendation, and it is completely unqualified.

Please do not hesitate to contact me if you have any further questions.

Sincerely,

Diana J. Simon
Associate Clinical Professor of Law
Tel: (520) 907-3800
E-Mail: dianasimon@arizona.edu

Neal J. Brubaker

429 E Delano St. Tucson, AZ 85705 • (620) 951-0580 • nealbrubaker@email.arizona.edu

WRITING SAMPLE

Submitted for: Magistrate Judge Eric Markovich

United States District Court, District of Arizona

Background: This is a draft order written for Judge Eric Markovich, a magistrate judge at the U.S. District Court for the District of Arizona. At issue is a pro se petition for a writ of habeas corpus. The facts of the case are real and summarized in the *Facts and Procedural Background* section of the order. All names and identifying case numbers have been changed to protect the privacy of the individuals involved.

DRAFT ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Alexander Gray, Petitioner, v. Jonathan Martin, Respondent.	No. CV-12-1234-TUC-RM (EJM) **REPORT AND RECOMMENDATION**

Pending before the Court is a pro se Petition for a Writ of Habeas Corpus (Doc. 8) filed pursuant to 28 U.S.C. § 2241 by Alexander Gray, who is confined in the United States Penitentiary in Tucson, Arizona. Gray alleges that 18 U.S.C. § 2251(e) was improperly used to enhance his sentence and requests that the Court vacate his life sentence and remand for re-sentencing.

Respondent argues that Gray's § 2241 petition is actually a § 2255 motion because his allegations do not implicate the "escape hatch" or "savings clause" of § 2255(e) and therefore should be dismissed by the Court for lack of jurisdiction. (Doc. 21 at 3). Alternatively, Respondent argues that Gray failed to meet his burden to show that his prior conviction was broader than the generic definition of the crime used in his sentencing determination. (Doc. 21 at 6).

Pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure, this matter was referred to Magistrate Judge Markovich for a Report and Recommendation. For the reasons discussed below, the Court lacks jurisdiction to hear the § 2441 petition. Because

the Ninth Circuit's ruling in *Schopp* did not materially change § 3559(e), the law with which Gray was sentenced, Gray has not made a claim of actual innocence and had an unobstructed procedural shot to present his claims. Accordingly, it is recommended that the District Court dismiss the petition.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 12, 2010, Gray pleaded guilty under a three-count indictment charging him with: (1) production of child pornography, 18 U.S.C. § 2251(a); (2) transportation of child pornography, 18 U.S.C. § 2252A(a)(1); and (3) possession of child pornography, 18 U.S.C. § 2252A(a)(5)(B). (Doc. 21-3 at 1). After the government voluntarily dismissed Counts 2 and 3, the U.S. District Court for the Middle District of Alabama entered judgment against Gray for the production of child pornography in violation of 18 U.S.C. 2251(a). *Id.*

The district court sentenced Gray under 18 U.S.C. § 3559(e). *Gray v. United States*, No. 1:12-CV-1234-WKW, 2015 WL 1234, at *1 (M.D. Ala. Jan. 3, 2015) [1]; (Doc. 28-1 at 14). § 3559(e) states that "[a] person who is convicted of a Federal sex offense in which a minor is the victim shall be sentenced to life imprisonment if the person has a prior sex conviction in which a minor was the victim." [2] Gray had been convicted under Missouri state law of two counts of felony sodomy for deviate sexual intercourse with a person less than fourteen years old. (Doc. 25 at 19). Based on Gray's present conviction for a federal sex offense involving a minor victim and prior sex convictions involving a minor victim, the court sentenced Gray to a term of life imprisonment followed by a life term of supervised release. (Doc. 21-3 at 1-3; Doc. 28-1 at 14).

Judgment was entered by the district court on March 2, 2010. *Gray*, 2015 WL 1234, at *1. Because Gray took no direct appeal, his conviction became final on March 16, 2010.

[1] The citation has been changed for this writing sample to protect the petitioner's privacy.
[2] "Prior sex conviction" is defined as a "conviction for which the sentence was imposed before the conduct occurred constituting the subsequent Federal sex offense, and which was for a Federal sex offense or a State sex offense." 18 U.S.C. § 3559(e)(2)(C). "State sex offense" means "an offense under State law that is punishable by more than one year in prison and consists of conduct that would be a Federal sex offense." *Id.* § 3559(e)(2)(B). Petitioner was sentenced to 15 years in prison for these offenses. (Doc. 25 at 19).

Id. at *2. On November 13, 2012, he filed a motion under § 2255, raising claims for ineffective assistance of counsel, a miscalculation of his base offense level that resulted in an Ex Post Facto Clause violation, and that the government engaged in prosecutorial misconduct in obtaining his indictment. *Id.* at *1. The district court denied Gray's § 2255 motion because it was time-barred, having been filed after the one-year limitation period in § 2255(f). *Id.*

Gray filed this petition under § 2241 for a writ of habeas corpus on April 9, 2020. (Doc. 8 at 1). He argues that § 2251 was improperly used to enhance his sentence because the Ninth Circuit's decision in *Schopp* materially changed the law. (Doc. 8 at 1, 4). Gray claims that his prior state convictions do not relate to the sexual exploitation of children and therefore, cannot serve as predicate offenses for the purposes of the multiple conviction enhancement in § 2251(e). (Doc. 8 at 4-5).

II. DISCUSSION

a. Jurisdiction

When deciding whether a court has jurisdiction, it must first determine whether a habeas petition has been filed pursuant to 28 U.S.C. § 2241 or § 2255. *Hernandez v. Campbell*, 204 F.3d 861, 865 (9th Cir. 2000). Generally, a federal prisoner challenging the legality of a sentence must raise a § 2255 motion in the sentencing court. *Harrison v. Ollison*, 519 F.3d 952, 954 (9th Cir. 2008). A prisoner challenging the manner, location, or conditions of the execution of a sentence must bring a § 2241 petition in the custodial court. *Hernandez*, 204 F.3d at 864. A prisoner may not bring a second or successive petition under § 2255 unless he has received certification from the appropriate court of appeals and his motion contains either highly probative newly discovered evidence or a new, retroactive rule of constitutional law. 28 U.S.C. § 2255(h); *Harrison*, 519 F.3d at 955. The restrictions on the availability of a § 2255 motion cannot be avoided through a petition under § 2241. *Stephens v. Herrera*, 464 F.3d 895, 897 (9th Cir. 2006).

The lone exception against subsequent § 2255 petitions is the so-called "escape hatch" or "savings clause" of § 2255. *Lorentsen v. Hood*, 223 F.3d 950, 953 (9th Cir. 2000).

The escape hatch permits a federal prisoner to "file a habeas corpus petition pursuant to § 2241 to contest the legality of a sentence where his remedy under § 2255 is 'inadequate or ineffective to test the legality of his detention.'" *Stephens*, 464 F.3d at 897; 28 U.S.C. § 2255(e).[3] A § 2241 petition qualifies for the escape hatch where a petitioner: (1) makes a claim of actual innocence; and (2) has not had an unobstructed procedural shot at presenting that claim. *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011). If a petition meets the escape hatch requirements, the petitioner can avoid the procedural prohibitions on the filing of second or successive petitions under § 2255. *See Ivy v. Pontesso*, 329 F.3d 1057, 1059 (9th Cir. 2003).

Therefore, the Court must first determine whether Gray's claim satisfies the requirements of the escape hatch before reaching the claim's merits. If the Petition falls under the escape hatch so as to be a petition pursuant to § 2241, the District of Arizona has jurisdiction. However, if the escape hatch does not apply, then the Petition must be construed as a petition under § 2255, for which only the Middle District of Alabama has jurisdiction. For the following reasons, the Court finds that Petitioner has not satisfied his burden to demonstrate that the escape hatch applies. Accordingly, the undersigned recommends that the District Court dismiss the petition for lack of jurisdiction.

i. Actual Innocence for Purposes of the "Escape Hatch"

In order to establish actual innocence under the escape hatch, a petitioner "must demonstrate that, in the light of all the evidence it is more likely than not that no reasonable juror would have convicted him." *Alaimalo*, 645 F.3d at 1047. Actual innocence applies not only to a petitioner's conviction, but also to their sentencing enhancements. *Allen v. Ives*, 950 F.3d 1184, 1189 (9th Cir. 2020). In *Allen*, the Ninth Circuit considered the issue of whether it had jurisdiction over a § 2241 petition where the petitioner did not dispute the validity of his conviction but claimed he was "actually innocent of the sentence that was imposed." *Id.* at 1188-90. The court agreed, holding that the petitioner made a claim

[3] The prohibition on successive § 2255 petitions does not per se make § 2255 an inadequate or ineffective remedy for purposes of the escape hatch. *Lorentsen*, 223 F.3d at 953.

of actual innocence that permits jurisdiction over his § 2241 petition. *Id.* at 1189. The court reasoned that if the petitioner's prior conviction "was not a predicate conviction for career offender status under the Guidelines, the factual predicate for his mandatory sentencing enhancement did not exist. That is, he is actually innocent of the enhancement." *Id.*

Next, an intervening court decision that materially changes the applicable law may constitute a showing of actual innocence. *Alaimalo,* 645 F.3d at 1047; *Harrison*, 519 F.3d at 960. For example, the petitioner in *Alaimalo* had been convicted for importing methamphetamine from California to Guam. *Id.* at 1045. Because the drugs travelled over international waters, his actions qualified as importation despite traveling from one location in the United States (California) to another (Guam). *Id.* Six years later, in *United States v. Cabaccang*, 332 F.3d 622, 623 (9th Cir. 2003) (en banc), the Ninth Circuit overruled two previous decisions and held that transporting drugs from one location in the United States to another does not constitute importation. *Alaimalo,* 645 F.3d at 1046. The petitioner filed a petition for habeas corpus under § 2241, claiming that he was actually innocent based on the Ninth Circuit's new interpretation of importation. *Id.* The court found that the petitioner had made a showing of actual innocence because the act for which he had been convicted was not a crime. *Alaimalo*, 645 F.3d at 1047. Because *Cabaccang* "effected a material change in the law applicable to [petitioner's] case," the petitioner was able to demonstrate that he was actually innocent. *Id.*

Gray argues that his situation is analogous to *Alaimalo* by claiming that *United States v. Schopp,* 938 F.3d 1053 (9th Cir. 2019) materially changed the law regarding the statute under which he was sentenced. In *Schopp,* the defendant had pleaded guilty to the production of child pornography and the district court sentenced him under 18 U.S.C. § 2251(e). *Schopp,* 938 F.3d at 1056. The statute's penalty provision states that a defendant with "2 or more prior convictions . . . under the laws of any State relating to the sexual exploitation of children . . . shall be . . . imprisoned not less than 35 years nor more than life. 18 U.S.C. § 2251(e). Because the defendant had prior Alaska convictions relating to the sexual assault and sexual abuse of minors, the district court applied the maximum

sentence allowed in § 2251, concluding that these prior convictions related to the "sexual exploitation of children." *Schopp*, 938 F.3d at 1056.

On appeal, the Ninth Circuit reversed, finding that the defendant's prior offenses did not relate to the sexual exploitation of children and thus could not serve as predicate offenses under § 2251(e). *Id.* at 1069. The Ninth Circuit applied the categorical approach set out in *Taylor v. United States*, 495 U.S. 475 (1990), consisting of defining the federal generic offense, then determining whether the elements of the state crime sufficiently match the elements of the generic federal offense. *Id.* at 1058-59. It first held that the federal generic definition of "sexual exploitation of children" as set forth in § 2251(e) as "as the production of visual depictions of children engaging in sexually explicit conduct, or put simply, the production of child pornography." *Id.* at 1061. The court found that the state offenses for sexual assault and abuse of minors were not a categorical match because each contained different elements than the federal generic definition. Specifically, the elements of the state crimes did not contain the production of child pornography. *Id.* at 1062-63. Because the defendant's prior state convictions were not a categorical match, the court held that they could not serve as predicate offenses for the multiple conviction enhancement under § 2251(e) and remanded for resentencing. *Id.* at 1063, 1069.

Here, Gray is not "actually innocent" for the escape hatch because he was not sentenced under § 2251(e) and there was no material change in the law underlying his sentence. Citing the changed definition of "sexual exploitation of children" from *Schopp*, Gray claims that his prior state offenses for felony sodomy with a person less than 14 years old are not a categorical match because producing child pornography was not part of the state offenses. He argues therefore, that his prior state convictions cannot serve as predicate offenses under § 2251(e).

However, while Gray was convicted under § 2251(a), the district court sentenced him pursuant to § 3559(e). § 3559(e) requires a sentence of life imprisonment if "[a] person who is convicted of a Federal sex offense in which a minor is the victim . . . has a prior sex conviction in which a minor was the victim." The statute contains different elements from

§ 2251(e) and does not reference "sexual exploitation of children." As such, *Schopp* did not materially change the law relating to Gray's sentence.

Therefore, the Court finds that Gray has failed to satisfy that he is actually innocent for purposes of the escape hatch.

ii. Unobstructed Procedural Shot to Present Claims

Even assuming that Gray has made a claim of actual innocence, he still must demonstrate that he has not had an unobstructed procedural shot at presenting that claim. *Harrison*, 519 F.3d at 959. A § 2241 petitioner can demonstrate a lack of unobstructed procedural shot to present a claim by showing that controlling law would have foreclosed the claim at the time. *Alaimalo*, 645 F.3d at 1048 (finding the petitioner had not had an unobstructed procedural shot to present a claim where Ninth Circuit law clearly established the legality of the conviction); *see also Allen*, 950 F.3d at 1190 (holding no procedural shot existed because the petitioner's claim would have failed under the law at the time of his § 2255 motion).

Gray claims to satisfy this requirement by arguing that because *Schopp* was decided in 2019, he had no opportunity to raise these arguments at the time of his direct appeal or § 2255 motion. However, as stated previously, *Schopp* did not materially change the law relating to Gray's sentence. His claims were not foreclosed by controlling law because the standards regarding § 3559(e) were the same before and after *Schopp* was decided. Gray could have raised his arguments—that his prior state conviction was broader than the generic definition of the federal crime set forth in § 3559(e)—on direct appeal or in a timely § 2255 motion.

Therefore, the Court finds that Gray had an unobstructed procedural shot to present his claims.

B. Dismissal

For the reasons stated above, Gray may only bring his claim in a § 2255 motion because the escape hatch is unavailable to him. Because § 2255 motions must be filed in the district where the Petitioner was sentenced, this Court is without jurisdiction to hear a

recharacterized § 2255 motion. *See* 28 U.S.C. § 2255(a); *Muth v. Fondren*, 676 F.3d 815, 818 (9th Cir. 2012). Gray is serving a sentence imposed by the United States District Court for the Middle District of Alabama and therefore must file a § 2255 petition with that court. This this Court must decide whether to dismiss the petition or transfer it to the Middle District of Alabama. *See* 28 U.S.C. § 1631. Transfer is appropriate if three conditions are met: "(1) the transferring court lacks jurisdiction; (2) the transferee could have exercised jurisdiction at the time the action was filed; and (3) the transfer is in the interest of justice." *Cruz-Aguilera v. I.N.S.*, 245 F.3d 1070, 1074 (9th Cir. 2001) (citing *Kolek v. Engen*, 869 F.2d 1281, 1284 (9th Cir. 1989)). Here, as discussed above, the first factor is met, but the other two are not.

Because this is a subsequent § 2255 petition, the District Court for the Middle District of Alabama could not have exercised jurisdiction over this petition at the time the action was filed. Instead, Gray would first need to seek Eleventh Circuit authorization to file the subsequent § 2255 petition. *See* 28 U.S.C. § 2255(h); *Harrison*, 519 F.3d at 955. Since the Middle District of Alabama could not have exercised jurisdiction over the claim, the second condition for transfer is not met. The third condition is also not met. Because the transferee court would not be able to exercise jurisdiction over the instant petition, transfer of the case would not further the interests of justice. Therefore, dismissal of the instant § 2241 petition is warranted.

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WRITING SAMPLE

Submitted for: Professor David McCallum

Course: Advanced Legal Writing

University of Arizona – James E. Rogers College of Law

Background: This is the argument section of a federal appellate brief arguing that a prison's zero tolerance policy imposed a substantial burden on a plaintiff's religious exercise rights. The facts of the case are fictional and are summarized in the *Statement of the Case* section of the brief.

STATEMENT OF THE CASE

This case involves a prisoner who was prohibited from eating kosher—an essential part of his Jewish faith—because of a single violation of the Prison's zero-tolerance policy.

Chandler Bing was imprisoned at the East Arizona State Prison Complex in Stafford, Arizona to serve a five-year prison sentence. [R. at 4.] On his first day, he requested to be enrolled in the Prison's religious meal program that provided kosher meals to inmates with a sincere Jewish faith. [R. at 4.] In the determination meeting with the prison chaplain, Reverend Phoebe Buffay, Bing explained his Jewish Orthodox upbringing, regular synagogue attendance, and strict adherence to kosher—including the fact that he had never eaten a non-kosher food item in his life. [R. at 4, 18.] Reverend Buffay found Bing's Jewish beliefs to be sincere and enrolled him in the kosher meal program. [R. at 4, 18.]

One day during lunch, Bing was sitting alone eating his kosher meal when another inmate, Ross Geller, approached him. [R. at 4, 20.] Geller began verbally harassing Bing for his kosher meals, exclaiming, "Why should you get special treatment? You think you're better than the rest of us?" [R. at 4, 20.] Geller then knocked Bing's tray off the table and physically attacked him. [R. at 4, 20.] Only then did prison guards step in and broke up the fight. [R. at 4, 20.]

Because his kosher meal had been thrown on the floor and ruined, Bing asked the guards for another kosher meal but was not allowed to have another. [R. at 4–5.] Accordingly, Bing did not eat any lunch that day. [R. at 5.]

That evening, Bing went to Warden Rachel Green's office to discuss the incident during dinner time. [R. at 5.] He told her the attack had frightened him and made him self-conscious about eating his meals in the prison mess hall. [R. at 5.] He informed her that this was no isolated incident; Bing had been harassed because of his kosher meals on multiple occasions. [R. at 41.] Warden Green denied his requests to eat in a private room, citing a lack of prison resources. [R. at 5.]

That evening, having missed both lunch and dinner, Bing was wracked with hunger and began to feel lightheaded [R. at 38.] Feeling like he "had no choice," he purchased a non-kosher meal from the prison canteen. [R. at 42.]

The next morning, the Prison informed Bing that he could no longer receive kosher meals or attend the special Jewish services held on Saturdays and Sundays. [R. at 5.] Bing demanded another meeting with Warden Green and explained his reasons for eating non-kosher foods. [R. at 5.] Warden Green explained the Prison's strict zero-tolerance policy regarding the religious meal program. [R. at 5.]

The Prison's policy removes inmates from the religious meal list after just one deviation from their religious diet. [R. at 28.] Inmates who violate the policy once are also barred from attending religious services. [R. at 28.] According to the Prison, the policy "is necessary in order to reduce operating costs and still have the resources to accommodate inmates with a sincere commitment to their religious practice." [R. at 28.]

The East Arizona Department of Corrections laid out these budgetary concerns in a memo to Warden Green. [R. at 26.] It informed her that the state is reducing the Prison budget by fifteen percent in the upcoming year. [R. at 26.] Regarding the costs of religious meals, the memo stated that "religious meals cost twice the amount of regular meals, and inmate meals, in general, cost 10% of the prison's budget." [R. at 26.] It also noted that more personnel and resources were required for providing special meals and services and stated that "personnel costs count for 80% of the prison's budget." [R. at 26.]

Because of this lone violation, Bing was permanently banned from eating kosher meals and attending Jewish services. [R. at 5, 38.] He has become depressed and ashamed as this marks the first time in his life eating non-kosher foods. [R. at 5.]

Bing then sued the East Arizona Department of Corrections, Rachel Green, Phoebe Buffay, and the State of East Arizona (collectively, "the Prison"), alleging a violation of his religious exercise rights. [R. at 2.] The Prison filed a motion for summary judgment and Bing filed a cross-motion for summary judgment. [R. at 9, 31.] The U.S. District Court for the District of East Arizona granted the Prison's motion for summary judgment and denied Bing's motion. [R. at 45.] The district court found that the Prison's policy did not substantially burden Bing's religious exercise, concluding that "the Prison put no pressure on him" to break kosher. [R. at 47.] Even if a substantial burden had been found, the court also held that the policy was the least restrictive means of furthering the state's compelling interest in fiscal responsibility. [R. at 47.] Bing has appealed the district court's ruling. [R. at 49.]

ARGUMENT

When one's freedom is limited behind prison walls, the freedom to practice your religion becomes even more important. The Prison's zero-tolerance policy violates this critical religious exercise right. Because the policy forced Bing to choose between intense hunger and violating his religion and prohibited him from participating in group prayer services, it imposes a substantial burden. While Bing has shown that a substantial burden exists, the Prison has not shown whether the policy furthers a compelling interest by the least restrictive means.

The Religious Land Use and Institutionalized Persons Act ("RLUIPA") states that "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the government demonstrates that the policy "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). Building on and extending First Amendment religious protections, RLUIPA was enacted in order to protect against "egregious and unnecessary" prison restrictions on religious liberty. *See Cutter v. Wilkinson*, 544 U.S. 709, 714–17

(2005) (quoting 146 Cong. Rec. S7775 (July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy)).

A motion for summary judgment can only be granted "if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Colvin v. Caruso*, 605 F.3d 282, 288 (6th Cir. 2010). An appellate court reviews a district court's grant of summary judgment de novo. *Colvin*, 605 F.3d at 288.

Because the Prison's policy substantially burdens Bing, and the Prison has failed to meet its burden to prove that a compelling interest is furthered by the least restrictive means, this Court should reverse the district court's decision.

I. THE PRISON'S ZERO-TOLERANCE POLICY SUBSTANTIALLY BURDENS BING.

A. The Prison's Policy Constitutes a Substantial Burden Because It Forced Bing to Choose Between Intense Hunger and Violating His Religious Beliefs.

RLUIPA first asks whether the government has imposed a substantial burden on a person's religious exercise. § 2000cc-1(a). A substantial burden exists where the government places "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981); *see also Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (finding a substantial burden where government policy forced the plaintiff "to choose between following the precepts of her religion and forfeiting benefits . . . and abandoning one of the precepts of her religion"). The plaintiff has the burden to show a substantial burden exists. § 2000cc-2(b).

First, a substantial burden exists where a prison's actions prohibit an inmate from eating religious meals required by their faith. *Lovelace v. Lee*, 472 F.3d 174, 187–89 (4th Cir. 2006); *Colvin*, 605 F.3d at 296–97. For example, in *Lovelace*, the court held that the prison's zero-tolerance policy substantially burdened an inmate because the policy prohibited him from eating religious meals and participating in group prayers after a single violation. *Lovelace*, 472 F.3d at 187. There, a Muslim

inmate was placed on a list for Ramadan evening meals. *Id.* at 182. The prison's policy removed inmates from the list if they violated the policy by getting a daytime meal. *Id.* After being accused of getting a daytime meal, the inmate was removed from the list. *Id.* at 183. The court reasoned that by preventing him from receiving religious meals and attending group prayers, the inmate was forced to "significantly modify his religious behavior." *Id.* at 189; *see also Reed v. Bryant*, 719 Fed. Appx. 771, 778 (10th Cir. 2017) (finding a prison's zero-tolerance policy requiring even the temporary suspension of inmates who may have violated the rule can impose a substantial burden).

In contrast, when the prison's actions do not pressure a prisoner to eat foods violating their religious beliefs, no substantial burden exists. *Brown-El v. Harris*, 26 F.3d 68, 70 (8th Cir. 1994). In *Brown-El*, the court held that a prisoner's removal from the Ramadan meal list for breaking fast once was not a substantial burden. *Id.* There, a Muslim prisoner was placed on the Ramadan meal schedule, which according to the Islamic faith, prohibited daytime meals. *Id.* at 69. The prisoner had been placed in an infirmary cell where he broke the fast by eating a daytime meal, leading to his removal from the meal list. *Id.* Although the prisoner claimed that eating a meal was within his faith's injury exception to the daylight fast, he provided no documentation or affidavits to support this assertion. *Id.* Further, no evidence suggested the prison denied the prisoner his religious meal or that he ever missed a scheduled mealtime. *Id.* The court characterized his actions as a choice and found no substantial burden existed. *Id. But see Lovelace*, 472 F.3d at 189 ("Regardless of how [the inmate's] removal from the Ramadan pass list is characterized . . . RUILPA's protections apply even though [his] alleged rule infraction triggered his wholesale exclusion from religious [activities]").

Moreover, a zero-tolerance policy constitutes a substantial burden because it requires absolute adherence to religious beliefs, something unattainable to all but the most devoted followers. *See Lovelace*, 472 F.3d at 188. Prisoners need not adhere perfectly to every aspect of their faith in order to have an authentic belief. *See id.*; *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988)

(concluding that a prisoner may not be insincere in his religious beliefs simply because he ate meat in violation of his faith); *Kuperman v. Warden, New Hampshire State Prison*, No. CIV. 06-CV-420-JL, 2009 WL 4042760, at *5 (D.N.H. Nov. 20, 2009) (stating that although a zero-tolerance policy "imposes no burden on the hypothetical prisoner who adheres perfectly to his religious diet, few religious believers—especially *imprisoned* believers—would lay claim to perfection").

Here, the Prison's policy forced Bing to choose between intense hunger and violating his religious beliefs and then barred him from eating kosher because he chose to ease his hunger. Like the prisons in *Lovelace* and *Reed*, the Prison prohibited Bing from eating kosher after only one violation. [R. at 36–37.] Bing's reasonable explanations to Warden Green went unheard and his inability to eat kosher has caused him extreme distress. [R. at 38.]

Importantly, unlike the prisoner in *Brown-El*, who was never pressured by prison policy or action, Bing did not face a real choice in his decision to eat non-kosher foods. First, during lunch on March 5, 2018, Bing was harassed and physically assaulted by another inmate. [R. at 37.] The Prison guards failed to prevent the assault, during which Bing's kosher food tray fell to the floor and was ruined. [R. at 38.] Fearing for his safety, Bing did not eat dinner at the mess hall. [R. at 38.] He was forced to eat a non-kosher because he "was extremely hungry and starting to feel light-headed." [R. at 38.] Bing did not make a real choice here, but rather was forced into a corner.

Finally, consider what the prison's policy forces prisoners like Bing to do. A prisoner must adhere to each and every component of their faith practice, even when faced with debilitating hunger. Forcing prisoners to adhere to these demanding standards inevitably leads to failure. Therefore, because the Prison's policy prevented Bing from eating kosher because of a forced choice, a substantial burden exists.

B. The Prison's Policy Substantially Burdens Bing by Barring Him from Participating in Jewish Services.

While prisons are allowed to question whether a prisoner's religiosity is authentic, a substantial burden exists where prison policy assumes a lack of sincerity with respect to one practice means a lack of sincerity with respect to others. *Lovelace* 472 F.3d at 188.

A substantial burden results where prisons bar prisoners from participation in one religious activity for not adhering to another religious practice. *Lovelace*, 472 F.3d at 188. In *Lovelace*, the court found a substantial burden where a prisoner was prohibited from participating in group prayers and services after being removed from the Ramadan pass list for a meal violation. *Id.* at 187. The prison's policy meant that disqualification from one religious practice meant removal from the others as well. *Id.* at 189. The court reasoned that religious adherents can select which practices to participate in and need not be perfect in one area to participate in another. *Id.* at 188.

Here, the denial of Jewish prayer services constitutes a substantial burden. Like the prisoner in *Lovelace*, who was prohibited from attending religious services in addition to his special meals, Bing could not attend the Jewish prayer services on Saturday and Sunday because he violated the policy. [R. at 38.] Since a separate privilege was removed in addition to his kosher meals, a substantial burden exists.

II. THE PRISON HAS NOT MET ITS BURDEN TO PROVE THAT COST IS A COMPELLING GOVERNMENT INTEREST.

After a substantial burden has been shown, the government must demonstrate that the policy furthers a compelling governmental interest. §§ 2000cc, 2000cc-2; *Holt v. Hobbs*, 574 U.S. 352, 363–64 (2015).

As an initial matter, cost is generally considered a compelling interest. *Ali v. Stephens*, 822 F.3d 776, 792 (5th Cir. 2016). However, because RLUIPA explicitly states that compliance "may require the government to incur expenses in its own operations to avoid imposing a substantial

burden," § 2000cc-3(c), the government's interest in reducing cost is less compelling in the RLUIPA context than elsewhere. *Williams v. Annucci*, 895 F.3d 180, 190 (2d Cir. 2018). While some deference should be afforded to prison administrators regarding costs, *see Cutter*, 544 U.S. at 723, prisons must still satisfy this burden by providing detailed evidence showing that the cost savings of a particular policy rise to some significant level to be a compelling interest. Because the Prison has not provided the required detailed, specific information to meet its burden, no compelling interest exists.

In order for the Prison to meet its burden, it must provide evidence specifically demonstrating the costs and security interests of the prison. *Baranowski v. Hart*, 486 F.3d 112, 118 (5th Cir. 2007); *see also Knight v. Thompson*, 797 F.3d 934, 944–45 (11th Cir. 2015) (finding the prison met its burden based on a "reasoned and fairly detailed explanation" including numerous examples of how the policy addressed genuine concerns). In *Baranowski*, the court held that a prison met its burden where it provided copies of various prison policies and sworn affidavits regarding the number of Jewish inmates, exact costs of providing kosher meals, and impacts of providing these meals. *Baranowski*, 486 F.3d at 125. The prison identified approximately seventy practicing Jewish inmates and concluded that the costs of providing kosher food to these Jewish inmates would be overly burdensome based on detailed food cost estimates. *Id.* at 117–18. Specifically, kosher meals cost between 12 and 15 dollars per day per inmate, while the non-kosher meals cost $2.46 per day. *Id.*

Conversely, a compelling government interest cannot be found where the government provides insufficient or minimal evidence. *Wall v. Wade*, 741 F.3d 492, 501 (4th Cir. 2014). For example, in *Wall*, the Fourth Circuit held that a prison failed to meet its burden where it only "contend[ed] generally" that special religious meals were expensive and would require changes in security. *Id.* The prison cited these cost and security concerns after removing a prisoner from the Ramadan meal list. *Id.* at 495, 501. However, the record was "void of any *specific information* regarding

these purported costs." *Id.* at 501 (emphasis added). The court emphasized the lack of detailed evidence, considering the minimal costs of adding one inmate to an already existing program. *Id.*; *see also United States v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1341, 1347 (11th Cir. 2016) (finding no compelling interest where the prison faced a budget deficit and argued that the "cost for the [kosher] meals is high").

When determining whether a cost is compelling, a court may need to measure the projected expense against the resources devoted to that interest. *Moussazadeh*, 703 F.3d at 795. Cost savings must make up some significant fraction of the prison's budget in order to be a compelling interest. *Ali*, 822 F.3d at 797. For instance, in *Ali*, the Fifth Circuit held that cost savings of $39,221 out of a budget of $1.045 billion were too low to constitute a compelling government interest. *Id.* The court compared the additional staffing costs associated with searching all Muslim prisoners' religious headwear to the total staffing budget. *Id.* The cost savings amounted to a mere .004% of the budget. *Id.*; *see also Moussazadeh v. Texas Dep't of Crim. Just.*, 703 F.3d 781, 795 (5th Cir. 2012) (expressing skepticism that a prison had a compelling interest where the cost savings were less than .05% of the food budget).

Here, the Prison has failed to meet its burden to prove that cost is a compelling government interest as it has offered only broad, non-specific budgetary concerns in support. First, the evidence provided by the prison showing the cost interest is only a few short sentences, far less than the "fairly detailed explanation" provided in *Knight*, or the sworn affidavits detailing costs in *Baranowski*. [R. at 26.] These few sentences provide little of the necessary context and detail required to meet its burden.

Further, unlike the prison in *Baranowski*, the Prison here has not provided the exact number of Jewish inmates, the number of inmates requiring religious meals, or the exact cost of the regular or religious meals. [*See* R. at 26.] These numbers are essential to knowing whether cost is a

compelling interest. They have also not provided how many prisoners might be affected by the zero-tolerance policy or identified the costs of any alternatives. Although the prison states that "[r]eligious meals cost twice the amount of regular meals," the impact differs dramatically based on the exact cost. [R. at 26.] For example, if a regular meal costs $1, then the doubled cost is a fairly insignificant $2. However, if a regular meal costs $10, then that doubled cost of $20 suddenly becomes much more compelling. Without knowing the exact costs or number of Jewish inmates requiring religious meals, a court cannot properly determine whether the interest is compelling.

Additionally, the Prison has failed to provide either the food budget or overall budget to compare against any exact cost savings. Instead, it only claims that inmate meals, in general, cost ten percent of the prison budget. [R. at 26.] Unlike in *Ali* and *Moussazadeh*, the percentage of costs relative to the Prison's budget cannot even be calculated.

Finally, while the Prison has given minimal information regarding the food costs, it has provided even less evidence that barring Bing from Jewish services results in any savings at all. [R. at 26.] The Prison memoranda only briefly mention that "holding religious services requires a great deal of personnel" and that "personnel costs are 80% of the budget." [R. at 26.] Because key details on each of these considerations have not been provided, the Court should find that the Prison has failed to meet its burden to show a compelling interest.

[Section III Omitted]

Applicant Details

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Date of JD/LLB	**May 19, 2024**
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Journal(s)	**Fordham Urban Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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August 1, 2023

The Honorable James O. Browning
United States District Court
for the District of New Mexico,
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I am a rising fourth-year law student in the evening division of Fordham University School of Law, where I am a member of the Urban Law Journal and a Deputy Executive Commentary Editor of the Voting Rights and Democracy Forum. I am respectfully applying for the one-year clerkship with your chambers for the 2025-2026 term or any term thereafter.

I am applying to be your clerk because it would be an invaluable opportunity to work as a public servant. Moreover, I would be honored to gain a mentor with a wealth of experience practicing law as a private attorney, a prosecutor, and a judge. Public service is a core value in my professional identity. As an associate at Booz Allen Hamilton, I help the Centers for Medicare and Medicaid Services and Social Security Administration provide essential benefits to millions of the neediest Americans. Although I have enjoyed that professional experience, I am changing careers because I want to take a more active role in promoting the public good. I shaped my law school experience with this goal in mind. At Fordham Law, I am a member of the Stein Scholars Program in Public Interest Law and Ethics, where I get specialized administrative support to pursue a public interest career and can easily network with fellow public interest students. I interned at the U.S. Attorney's Office for the Eastern District of New York to gain practical legal writing and research experience in a public service setting. I chose to be a summer associate at Selendy Gay Elsberg because it is a trial-oriented firm with a demonstrated commitment to public interest work. Recently, I was accepted into New York's Pro Bono Scholars program. This unique program will allow me to take the February 2024 bar exam. Afterward, I will provide free legal services to indigent clients until the end of May 2024.

Attached, please find my resume, unofficial law school transcript, undergraduate transcript, and writing samples. In addition, letters of recommendation are attached from Professors Jennifer Gordon (jgordon@fordham.edu, 212-636-7444), Abner Greene (agreene@fordham.edu, 212-636-6962), and Nestor Davidson (ndavidson@fordham.edu, 212-636-6195). Thank you for your kind consideration of my application.

Respectfully yours,

Daniel Caballero